92-1201

Supreme Court, U.S.
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No. 92-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ARMSTRONG WORLD INDUSTRIES, INC.,

Petitioner,

v.

THE INDUSTRY NETWORK SYSTEM, INC.
AND ELLIOT FINEMAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court should reverse the decision of the Third Circuit because it (a) ignored *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) and other controlling precedents of the Court, and (b) thereby held, in sharp and unexplained departures from well-established law, that a single oral comment by petitioner's local sales manager to one distributor-customer ("I don't think [it] makes a lot of sense" to distribute respondent's product) could serve as the foundation for a vertical antitrust conspiracy.

2. Whether the Third Circuit erred because (a) it adopted, contrary to the Court's decisions and those of at least four other circuits, a "functionally equivalent" test in holding that the relevant "market or submarket" included only two products (respondent's monthly video magazine sold to floor covering retailers and featuring industry-wide information, and petitioner's video "selling aids" sold only to its distributors and featuring only its own products), and (b) it thereby ignored the uncontradicted fact that no consumers of those products regarded them as being reasonable substitutes.

3. Whether the Third Circuit erred in holding that the decision of one wholesaler-distributor, out of at least 450 others, not to distribute respondent's video magazine in Connecticut caused injury to competition and related antitrust injury to respondent TINS in a market stipulated to be nationwide in geographic scope.

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Petitioner Armstrong World - Industries, Inc. ("Armstrong") prays that a writ of certiorari issue to review the judgment below of the Court of Appeals for the Third Circuit. Pursuant to Rule 29.1, Armstrong has no parent company and no subsidiaries other than wholly-owned subsidiaries.

OPINIONS BELOW

The opinion of the Third Circuit is reported at _____ F.2d _____ and is included in Appendix A to this petition. 1A-93A.[1] The district court's opinion is reported at 774 F. Supp. 225 (D.N.J. 1991) and is included in Appendix B, 94A-178A; the district court entered judgment n.o.v. for Armstrong on the claims of respondent, The Industry Network System, Inc. ("TINS"), under Section 2 of the Sherman Act, 15 U.S.C. § 2, and under New Jersey tort law. The district court's oral opinion during trial, granting Armstrong's motion for a directed verdict on TINS' conspiracy claims under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2, is included in Appendix C. 179A-183A.

JURISDICTION

The Third Circuit entered judgment on October 28, 1992, Appendix D, 184A-185A, and on November 24, 1992 denied (two judges dissenting) a timely petition for renearing and suggestion for rehearing *in banc*. Appendix E, 186A-187A. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

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[1] Citations to the Appendix to this petition will be identified with the suffix "____A;" citations to the Joint Appendix in the court of appeals will be identified with the prefix "JA____."

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

STATEMENT OF THE CASE

This case presents important issues concerning the legal criteria to ensure that routine commercial disputes involving state law tort or contract claims are not improperly transformed into mammoth federal antitrust cases. This is a case that has already consumed months of trial time, although the purported wrongful conduct was a single comment to a distributor-customer by Armstrong's local sales manager (I "don't think [it] makes a lot of sense" to distribute respondent's product), which resulted in a jury award of antitrust and tort damages aggregating more than $235 million. It also is a case in which the court below allowed antitrust law to run amok in sharp and unexplained departures from this Court's controlling precedents.

Immediately at issue is the Third Circuit's holding that TINS is entitled to reach the jury in a second trial on its conspiracy claim under Section 1 of the Sherman Act. The theory of TINS' claim, endorsed in the decision below, is that the single oral comment of Armstrong's employee amounted to a "threat" and "coercion" forcing one Armstrong distributor (Stern & Company or "Stern") to enter into a vertical antitrust conspiracy to "eliminate" TINS from a nationwide video magazine market for floor covering retailers. According to the Third Circuit, Stern "knowingly" delivered the fatal blow merely by exercising its lawful right to cancel a Letter of Intent to become TINS' magazine sales agent in Connecticut.

1. **The Parties and Their Products.** The principal parties are Armstrong and TINS. All claims of the individual

respondent (Elliot Fineman, President of TINS) were dismissed by district court orders not disturbed on appeal.

In the relevant period of 1984, Armstrong manufactured floor covering, both carpet and resilient (sometimes called "vinyl" or "linoleum"), which it sold to wholesale distributors who in turn resold to retailers. On a non-profit basis, Armstrong provided to its distributors "selling aids" in print, slide and video tape formats, all containing information only on Armstrong's resilient floor covering. In 1984 Armstrong had nine video cassettes that were available only to distributors at a price of $20 per cassette which distributors, without imposing any charge, on occasions allowed retailers to view.[2]

TINS was formed in 1983 with an equity investment of $5,000 to publish, "exclusively for floor covering retailers," a monthly video magazine containing industry-wide news, interviews and retailer "success" stories, plus a spliced-on "distributor's tag" typically in the form of an advertisement on behalf of each local distributor selling the magazine in an assigned territory. The initial annual subscription price of $480 was increased to $540 by May 1984. TINS solicited floor covering distributors to serve as agents for selling magazine

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[2] JA3830-31, 4777-78, 7946. In 1986 Armstrong added a new video laser disc as part of an integrated franchising package of customized showroom and floor display materials for use by participating retailers known as "Floor Fashion Centers" ("FFC"). JA3857-63, 3872-74. Armstrong's laser disc videos (i) were designed for viewing by *consumers* interested in consumer-type information, whereas TINS' magazine was "geared entirely to [viewing by] Floor Covering retailers" [JA7344], and (ii) focussed exclusively on Armstrong products [JA3865-66] (the same as the earlier nine cassettes for wholesalers only), whereas TINS' magazine covered the whole flooring industry with no promotion of any particular brand of floor covering. At the time of trial, the FFC program included approximately 700 participating retailers, who represented only 3-1/2% of the 20,000 floor covering retailers who were the targeted subscribers for TINS' magazine. JA3860-61, 7344.

subscriptions to retailers. After producing only eight monthly issues beginning in December 1983 and suffering net losses of almost $740,000 by May 31, 1984, JA8000-01, TINS ceased operations in July 1984 for lack of funds. JA1775-76.

2. **The Alleged Co-Conspirator**. In 1984 Armstrong distributed its resilient floor covering through approximately 69 local wholesalers, including Stern which served the Connecticut area. TINS alleged that Stern conspired with Armstrong to commit the single act purportedly designed to "eliminate" TINS from the alleged video magazine market. Specifically, on May 24, 1984 Stern signed a "Letter of Intent" prospectively to become a TINS magazine sales agent, and four weeks later during a TINS sales training program (prior to Stern's sales of any subscriptions), Stern exercised its lawful right to cancel the Letter of Intent.[3] Four Stern witnesses confirmed that the cancellation reflected their company's independent decision with no Armstrong involvement whatsoever. JA4301, 4318-19, 4665, 5027-28, 5292. Five other Armstrong wholesalers, who either distributed TINS' magazine in 1984 or seriously considered doing so, testified without contradiction that Armstrong had no influence on their decisions regarding TINS. JA4108, 4169, 4851, 5063, 5070-71, 5074, 5167-68, 5249-50.

3. **Armstrong's Conduct**. On June 7, 1984, Stern's President, Alan Abrahamson, attended a previously arranged business conference and voluntarily mentioned the prospective TINS arrangement to two local Armstrong sales managers, Robert Guzinsky for carpet and Robert Roth for resilient. Guzinsky said that TINS "sounds like a good idea." JA4048.

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[3] As a prospective sales agency contract with no specified term, the Letter of Intent was terminable at will as a matter of law. Restatement (Second) of Agency § 118, comments a and b (1957); 2 Walter H. E. Jaeger, *Williston on Contracts*, § 279 (3d ed. 1959); *see, e.g., NLRB* v. *Marcus Trucking Co.*, 286 F.2d 583, 588 (2d Cir. 1961).

Roth's comment is found in his answer to one leading question by TINS' counsel:

> Q. Did you say to Alan [Abrahamson], I don't think this [TINS] makes a lot of *sense in the* Armstrong scheme of things, given the fact that we do have our own video program that can help you [Stern] increase your profitability, that type of thing?
>
> A. That's probably what I [Roth] said because we have an overlap program.

188A. Abrahamson immediately made clear that Roth's "overlap" perception was in fact a misconception. Abrahamson replied that, instead of being an overlap, TINS' magazine would "fill in a void" because it did something that Armstrong's videos did not do. The business conference then turned to other matters. JA4080. The pertinent portions of Roth's testimony are in Appendix F. 188A-190A. In the 29 days between Stern's signing and cancelling the Letter of Intent, these brief comments on June 7 during a routine half-day business conference were the only TINS-related communications made by Armstrong to Stern.[4]

4. **Absence of Market Impact**. This case was tried in 1991, seven years after TINS ceased operations. During that period, Armstrong's videos had no discernible impact in the

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[4] Five days after the June 7 conference, Armstrong's sales manager at corporate headquarters, who had no knowledge of either Stern's Letter of Intent or the June 7 comments, prepared a short TINS-related memo that was circulated internally within Armstrong and never communicated to Stern. This memo is included in Appendix G. 191A-192A. It advised local managers that "participation" or "assistance" by local Armstrong personnel in the TINS program on behalf of a TINS distributor would be "improper" because it would discriminate against other competing Armstrong distributors not in the TINS program.

alleged video magazine market. The Third Circuit accordingly dismissed TINS' Section 2 Sherman Act claims, because "we are left without record support to discern precisely how extensively Armstrong has penetrated the video market for retailers." 71A-72A. *The Third Circuit also determined that because* "the record clearly proves that barriers to entry in the video market are extremely low," other firms have readily "produced their own substitute video magazine," and such production substitutability effectively prevented Armstrong from having any exclusionary power "even if Armstrong remains the only supplier in the relevant video market." *Id.*

5. **Proceedings Below**. The complaint contained both state law contract and tortious interference claims as well as federal and state antitrust claims, all based on the same alleged conduct of Armstrong. The contract claim was dismissed on summary judgment before trial. At the close of TINS' trial evidence, the district court directed a verdict for Armstrong on the Sherman Act Sections 1 and 2 conspiracy claims, holding that "under no set of circumstances based on this record could the jury reasonably find that Stern shared Armstrong's [alleged] *purpose* of eliminating TINS from competition in the video magazine market." 180A (emphasis added).[5]

The jury returned a verdict for TINS on the remaining claims, awarding $19.5 million antitrust damages prior to

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[5] The Third Circuit overturned this ruling on the theory that the district court, by using the word "purpose," had erroneously required proof that Stern and Armstrong had an identical *motive*, as distinct from a shared unlawful anticompetitive *objective*. 78A-80A. But the only anticompetitive motive or objective proffered by TINS was to eliminate TINS, and the "shared purpose" required in the district court's ruling is precisely what this Court has required, *i.e.*, "a unity of *purpose* or a common design and understanding, or a meeting of minds in an unlawful arrangement." *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (emphasis added, quoted citations omitted).

trebling, $17.7 million for tortious interference and $200 million as punitive damages. The district court granted Armstrong's motion for judgment n.o.v. because the "evidence, even viewed most favorably toward [TINS], is critically deficient with respect to two [essential] . . . elements: wrongful conduct and proximate cause." 130A. In the alternative, the district court granted a new trial on two independent grounds: the verdict was clearly against the weight of the evidence, and TINS' trial counsel had engaged in grossly improper conduct that prejudiced and inflamed the passions of the jury.

The Third Circuit upheld both grounds for a new trial and affirmed the judgment n.o.v. on TINS' non-conspiracy claims under Section 2 of the Sherman Act. (The directed verdict on TINS' Section 2 Sherman Act conspiracy claim was not appealed.) However, the Third Circuit reversed the directed verdict for Armstrong on TINS' Section 1 Sherman Act conspiracy claim, thus giving rise to this petition. The court of appeals also reversed summary judgment granted earlier in Armstrong's favor on the contract claim, as well as the judgment n.o.v. for Armstrong on TINS' state law claims for tortious interference and punitive damages.[6]

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[6] If TINS' Sherman Act conspiracy claim is invalidated, TINS' state law claims for tortious interference and associated punitive damages, though not the subject of this petition, are not likely to survive. The Third Circuit recognized that the inferences in Part III of its opinion on tort issues, e.g., premising a "threat" and "coercion" on Roth's statement, were the same for both the tort and antitrust claims. 79A, n.30. Moreover, if the punitive damage award had not been vacated by the new trial order, it would have been unconstitutional under *Pacific Mut. Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032 (1991).

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT'S CONSPIRACY RULING REFLECTS SHARP AND UNEXPLAINED CONFLICTS WITH THIS COURT'S CONTROLLING PRECEDENTS

Under any reasonable reading, the Third Circuit's conspiracy ruling irrationally restricts legitimate business dealings between manufacturers and their distributors, poses a clear threat to proper application of the antitrust laws, and stands in sharp and unexplained conflict with well-established law in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984); and *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986). Summary reversal is appropriate.

A. The Established Law on Vertical Conspiracies

In *Sylvania* the Court recognized that "[v]ertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." 433 U.S. at 54. For that reason, a manufacturer can "induce" its distributors "to engage in promotional activities or to provide service . . . necessary to the efficient marketing . . . and the competitiveness of [the manufacturer's] . . . product." *Id* at 55.

Building on *Sylvania*, the Court established in *Monsanto* that "manufacturers and distributors constantly must coordinate their activities to assure that their product will reach the consumer persuasively and efficiently," and that the antitrust law does not "bar a manufacturer" from such legitimate joint activities because that "would create an irrational dislocation in

the market." 465 U.S. at 763-64. *Monsanto* held that in a vertical conspiracy case the law requires "evidence sufficient to . . . prov[e] . . . an agreement," and does not allow "an inference of such an agreement . . . drawn from highly ambiguous evidence" because to do so would create "a considerable danger that the [Court's] doctrines enunciated in *Sylvania* and *Colgate* will be seriously eroded." *Id.* at 763.

To curtail such danger, *Monsanto* held that in the absence of direct evidence of a conspiratorial agreement, a vertical conspiracy must include at least two elements: (1) "There must be evidence that tends to exclude the possibility that the manufacturer and non-terminated distributors were acting independently," and (2) "evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer." *Id.* at 764 & n. 9. The evidence must establish that the distributor and manufacturer had "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement," or stated differently, that they "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Id.* (quoted citations omitted).

In *Matsushita*, the Court reinforced *Sylvania* and *Monsanto* by holding that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case," and further noting that *Monsanto* "held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." 475 U.S. at 588. *Matsushita* reaffirmed the *Monsanto* principle that conduct reflecting the "essence of competition" cannot be the basis for "mistaken inferences [which] . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Id.* at 594.

B. The Third Circuit's Glaring Departures From Established Law

The Third Circuit held that a jury could properly find a vertical conspiracy to "eliminate" TINS based on three facts deemed critical: (1) Roth's statement that it "does not make a lot of sense" for Stern to distribute a perceived "overlap" product; (2) Fineman's voluntary disclosure to Armstrong six months earlier that TINS was then in a precarious financial position; and (3) Armstrong's product accounted for approximately 90% of Stern's sales. The Third Circuit's reasoning is set forth below verbatim:

> -- [First], [a]lthough the inference is broad, *Roth's "overlap" statement* could have been understood to demonstrate that Abrahamson [Stern] recognized a conflict between Armstrong's and TINS' videotapes and *recognized Armstrong's anti-competitive goal.*
>
> -- Second, Armstrong clearly benefitted from eliminating TINS' competition in the video market and *Stern benefitted from appeasing the supplier* upon whom it was so dependent.
>
> -- Third, given the evidence that *Armstrong executives knew of TINS' precarious financial position* [six months earlier], the agreement between Armstrong and Stern would have been central to the demise of TINS.
>
> -- Thus we conclude that a rational factfinder could draw the inference that Armstrong wanted to eliminate TINS from the video market . . . and that Stern knowingly aided in that effort, albeit

> from somewhat different motives.
>
> -- It is not likely that Stern believed that it was the only distributor Armstrong did not wish TINS to deal with; and a jury could find that *Stern is chargeable with knowledge* that if Armstrong succeeded, TINS would indeed be eliminated as a competitor in that market.[7]

81A-82A (emphasis added). Incredibly, the Third Circuit failed even to consider this Court's controlling precedents that condemn such an attenuated chain of inferences. Its decision rests upon the following glaring conflicts with established law on vertical conspiracies.

1. **Absence of Any Basis for Inferences of "Anti-competitive Goal," "Threat" or "Coercion."** Obviously no coerced conspiracy can exist without coercion. To find coercion here, the Third Circuit was compelled to rely on Roth's "does not make a lot of sense" comment and to hold that this single oral statement (a) was a "threat" because Armstrong's position as Stern's main supplier "made Stern particularly susceptible to coercion," 43A, (b) "could have been understood to demonstrate . . . Armstrong's anticompetitive goal," 81A, and (c) showed "that Armstrong wanted to eliminate TINS [to avoid having] . . . to compete with TINS." *Id.*

These holdings stand in sharp conflict with established law. Under *Sylvania*, manufacturers are entitled to "induce [distributors] . . . to engage in promotional activities" to

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[7] In discussing tort issues, the Third Circuit also ruled that Roth's statement was a "threat" and that Stern was "susceptible to coercion" because of Stern's "dependence" upon Armstrong as its principal supplier. 42A-43A.

enhance "the competitiveness of [the manufacturer's] product". 433 U.S. at 55. Thus, Roth's statement was clearly proper and could not be a threat because, as the Third Circuit recognized, 81A, n.31, at most it only "counseled" Stern in a manner to encourage use of Armstrong's video selling aids, which admittedly promoted Armstrong's resilient flooring with "product information, sales training and techniques." 56A.[8]

Monsanto held that "manufacturers and distributors constantly must coordinate their activities to assure that their product will reach the consumer persuasively and efficiently" and that antitrust rules cannot be invoked "[t]o bar a manufacturer" from engaging in business conduct consistent with legitimate competition. 465 U.S. at 763-64. *Matsushita* reinforced the principle that conduct reflecting the "essence of competition" cannot support the inference of an antitrust conspiracy. 475 U.S. at 594. Apart from Guzinsky's comment terming TINS a "good idea," Armstrong's *only* mention of TINS to Stern was Roth's statement as a salesman — that it "did not make a lot of sense" for Stern to distribute a perceived "overlap" product. This is the "essence of competition" expressly protected by *Matsushita*. The Third Circuit provided no explanation for its holdings exactly opposite to the Court's

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[8] The district court held that "[n]o jury could reasonably infer from this [Roth] statement that Armstrong acted with any level of malice or intent to harm" because "the statement is not itself a threat, does not suggest a threat, and did not take place in a context suggesting a threat." 134A. The district court therefore ruled that Armstrong's actions did not rise to the level of being a proximate cause for that decision [of Stern] . . . and no reasonable juror could conclude otherwise." 145A. Other circuits, which have faithfully followed this Court's precedents, hold that a coerced vertical conspiracy cannot be inferred from the manufacturer's dealings with a distributor involving "exposition, persuasion, argument or pressure." *See, e.g., Jeanery, Inc.* v. *James Jeans, Inc.*, 849 F.2d 1148, 1158-59 (9th Cir. 1988); *Yentsch* v. *Texaco Inc.*, 630 F.2d 46, 53 (2d Cir. 1980). A leading scholar has observed that "the absence of even an indirect threat is exculpatory, especially when the feared retaliation [as here] has never occurred." VI Philip E. Areeda, *Antitrust Law* ¶ 1408b2, at 43 (1986).

well-established case law.

2. **No Legal Basis for the "Appeasement" Theory.** The Third Circuit recognized that Stern's "motivation" to enter the alleged conspiracy was an essential link in its chain of conspiratorial inferences. It held that, as a matter of law, this "inference of motivation," 94A n.30, could be premised on the further inference that "Stern benefitted from appeasing the supplier [Armstrong] upon whom it was so dependent" for 90% of its product. 96A (emphasis added). This appeasement theory has no anticompetitive component and would irrationally provide the "motivation" for an antitrust conspiracy in thousands of normal business relationships where a distributor is closely aligned with one manufacturer's product. More importantly, *Monsanto* clearly rejected such an appeasement theory by holding that "a distributor is free to acquiesce in the manufacturer's demand" and that no vertical conspiracy is created even if such acquiescence is motivated by the distributor's desire "to avoid termination." 465 U.S. at 761.

3. **Absence of Any "Acquiescence" by Stern.** The Third Circuit likewise never addressed the *Monsanto* holding that an antitrust vertical conspiracy cannot be inferred from circumstantial evidence in the absence of proof that "the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer." 465 U.S. at 764, n.9. The record contains not even a hint or suggestion of Stern's acquiescence to Roth's comment. To the contrary, immediately after Roth's statement, Abrahamson pointed out that TINS would "fill in a void" in Armstrong's videos, whereupon Roth said nothing more about TINS and the conference turned to other matters. 189A-190A. Thus, Stern never communicated, and Armstrong never sought, Stern's acquiescence or agreement to any "common scheme" to eliminate TINS. Once again, the Third Circuit's silence on this point reflects a glaring and

unexplained departure from established law.

4. **Impermissible Vicarious Knowledge Theory.** The Third Circuit asserted *ipse dixit* that "it is not likely that Stern believed it was the only distributor Armstrong did not wish TINS to deal with."[9] Then, it ruled there could be further inferences "that Stern is *chargeable with knowledge* that if Armstrong succeeded, TINS would indeed be eliminated." 97A (emphasis added). But the established law requires a "meeting of minds" or a "conscious commitment to a common scheme." *Monsanto*, 465 U.S. at 764. As a matter of law, vicarious knowledge "chargeable" to Stern cannot suffice.[10]

5. **Absence of Evidence to Exclude the Possibility of Stern's Independent Action.** The Third Circuit failed to

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[9] This assertion as to Stern's "belief" is sheer speculation flatly contrary to the record. All of Stern's *actual* knowledge of Armstrong's position concerning other TINS distributors was *favorable* to TINS. Stern called one Armstrong distributor in the TINS program at TINS' recommendation and received favorable comment, JA4661-62. When TINS ceased operations, five of its ten sales representatives were Armstrong distributors who had sold nearly 60% of the total subscriptions to TINS' magazine. JA7962-63.

[10] The Third Circuit, after complaining that "Armstrong inexplicably cites to a conscious parallelism case," proceeded to hold: "We do not require the same checks against speculation in a vertical case as we do in a conscious parallelism case." 82A-83A, n.32. This is plainly at odds with *Monsanto*, which teaches that checks against speculation in vertical cases are of the highest order. In *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 284-86 (1986), the Court in a conscious parallelism case rejected the inference that Cities had joined a conspiracy to "boycott" plaintiff based on evidence Cities had cancelled an allegedly favorable prospective contract with plaintiff and had knowledge this would aid the other alleged conspirators to attain their unlawful objective; however, because such alleged economic interests of Cities under the prospective contract were closer to those of plaintiff as compared to interests of others in the conspiracy, and because Cities had an independent reason for its action, "neither precedent nor logic supports petitioner's contention that the evidence . . . is significantly probative of conspiracy [by Cities]." *Id.* at 288. The same reasoning requires rejection of the Third Circuit's inference of conspiracy by Stern in this case.

address the *Monsanto* requirement that "there must be evidence that tends to exclude the possibility" that Stern acted independently in cancelling the Letter of Intent. 465 U.S. at 764. But the record established, as the Third Circuit acknowledged, that Abrahamson requested an "unconditional money-back guarantee" from TINS for dissatisfied subscribers, and TINS' National Sales Manager "admitted that he made no such promise to Abrahamson directly." 42A. This obviously was a legitimate independent business reason for Stern's cancellation of the Letter of Intent. Roth's single oral comment cannot satisfy the *Monsanto* requirement of evidence that tends to exclude the possibility of Stern's independent action.

6. **Irrational Business Conduct Required by Third Circuit's Decision.** *Monsanto* holds that a vertical conspiracy cannot rest on inferences that "would create an irrational dislocation in the market," such as a conspiratorial inference derived from the manufacturer's termination of a price-cutting distributor after receipt of "complaints" from other distributors. 465 U.S. at 764. The proffered rule rejected in *Monsanto* would have encouraged a manufacturer to adopt irrational steps to squelch such communications from distributors or to erect a Chinese Wall inhibiting their receipt. *See also Business Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717, 728 (1988) (legal rules on non-price vertical restraints must not encourage "[m]anufacturers . . . to forgo legitimate and competitively useful conduct rather than risk treble damages.")

But the Third Circuit's decision, if upheld, would require irrational business conduct far more perverse than that condemned in *Monsanto* and *Business Electronics*. What should Armstrong and other manufacturers do to avoid future lawsuits like this one?

Must Armstrong prohibit local sales personnel from

stating, in words or substance, that "it makes no sense" for their customer to distribute a perceived "overlap" product? Should Armstrong curtail its sales efforts directed to distributors for whom Armstrong has succeeded, or may soon succeed, in supplying 90% of their product? For purposes of the 90% test, is it significant that the distributor sells, or does not sell, non-floor covering products such as major household appliances? Should Armstrong attempt to impose restrictive procedures to prevent its personnel from hearing, or even reading in *The Wall Street Journal*, the voluntary disclosure of another company's poor financial condition? A safe harbor under the Third Circuit's decision would require irrational conduct consistent with an affirmative answer to each of the above questions.

In sum, the Third Circuit's decision on the alleged vertical conspiracy is based on numerous sharp and unexplained departures from well-established law. It should therefore be summarily reversed. *Cf. Palmer* v. *BRG, Inc.*, 111 S. Ct. 401 (1990).

II. THE THIRD CIRCUIT'S "FUNCTIONALLY EQUIVALENT" TEST FOR PRODUCT MARKET DEFINITION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS

The Third Circuit's decision is fundamentally flawed on the relevant product market purportedly restrained by the alleged conspiracy. In this case, the parties stipulated that the relevant *geographic* market for TINS' magazine was nationwide. As to the relevant *product* market, TINS alleged, and the Third Circuit agreed, that the relevant "market or submarket" included only two products: TINS' magazines that were sold for profit to retailers, plus Armstrong's video "selling aids" that were sold

on a non-profit basis only to its distributors.[11]

In upholding an alleged two-product "market or submarket," the Third Circuit relied on testimony of TINS' President (Fineman):

> [H]e opined that, with the sole exception that Armstrong's video exclusively focused upon Armstrong's products, Armstrong's and TINS' video network were *functionally equivalent* [because both] . . . provided product information and sales techniques.

55A (emphasis added). It then cited evidence indicating that distributors, without charge, "were showing [Armstrong's] videos to retailers," whereupon the court inexplicably announced that Armstrong therefore "admitted that its videos *would be sold* through distributors to retailers." 55A-56A (emphasis added). On this basis, the Third Circuit ruled: "Thus, the record supports the jury's inference that retailers may have perceived TINS' and Armstrong's videos to be interchangeable [because] [b]oth offered product information, sales training and techniques." 56A.

The Third Circuit could point to nothing in the record indicating that any retailer had such a perception or had ever actually purchased one video as a substitute for the other. Nor does the record show that a distributor (or even TINS itself) ever offered or sold one video as a substitute for the other. JA4227-29, 4861-62. To the contrary, *every* witness with personal knowledge of the use or marketing of the two videos

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[11] The Third Circuit's decision on the relevant video magazine market was made in connection with its ruling on TINS' Sherman Act Section 2 claims. 53A-56A. The court necessarily relied on the same analysis to uphold TINS' Section 1 claim.

confirmed that they were not reasonable substitutes. JA2212, 2897-98, 2909, 2913-14, 4227-29, 4864, 4891, 5077, 5184-85, 5270-71. TINS' National Sales Manager admitted that substitution made "no sense whatsoever." JA2331. The Third Circuit nonetheless ruled that the jury could have decided the market issue on the "functionally equivalent" test embodied in Fineman's testimony and that the jury "was free to disbelieve Armstrong's evidence," including the admission of TINS' National Sales Manager. 65A.[12]

Under well-established law, the threshold legal test of any product market is "reasonable interchangeability" from the viewpoint of *buyers*: "[The] market is composed of products that have reasonable interchangeability for the purposes for which they are produced — price, use and qualities considered." *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956) (*Cellophane*). In 1962, the Court reaffirmed the *Cellophane* test to identify a "broad market" but then opined: "However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes," and the Court listed seven "indicia" to identify "submarkets," none of which included a "functionally equivalent" test.[13] The Court recently stressed that market analysis in antitrust cases should be based on "actual market realities," and expressly reaffirmed the continuing validity of the

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[12] Even without TINS' admission of non-substitutability, it is firmly established that assumed "disbelief" by the jury of "discredited testimony is not considered a sufficient basis for drawing a contrary conclusion." *Bose Corp.* v. *Consumers Union*, 466 U.S. 485, 512 (1984).

[13] *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962). The Court also recognized the supplementary product-market test based on *production interchangeability*, *i.e.*, "cross-elasticity of production facilities may . . . be an important factor in defining a product market." *Id.* at 325, n.42. This test is discussed *infra*, at p. 22, in connection with the absence of any injury to competition.

buyer substitutability test: "The relevant market for antitrust purposes is determined by the choices available to Kodak equipment owners" who were buyers of the products or services in question. *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 112 S. Ct. 2072, 2082, 2090 (1992).

The Third Circuit's decision stands in clear and direct conflict with the well-established law in *Cellophane* and *Brown Shoe*. By adopting the "functionally equivalent" test, the court of appeals placed Armstrong's and TINS' videos in the same market without regard to whether buyers could or actually did substitute one for the other. This allowed the Third Circuit to disregard such crucial factors as *price differences* ($20 each for an Armstrong cassette versus $480/$540 per annual subscription for TINS' magazine); *content differences* (Armstrong featured only its own resilient products, while TINS covered the entire industry); *frequency differences* (Armstrong's videos were unscheduled and non-recurring, whereas TINS was a monthly magazine); and *customer differences* (Armstrong provided its nine cassettes only to its own distributors who gave free viewings to retailers handling Armstrong's resilient, while TINS' magazine was sold to all retailers).[14]

The Third Circuit's "functionally equivalent" test has been expressly rejected by at least four other circuits. In *United States* v. *Archer-Daniels-Midland Co.*, 866 F2d 242, 246 (8th Cir. 1988), *cert. denied*, 493 U.S. 809 (1989) the court recognized that "sugar and HFCS [high fructose corn syrup] are functionally interchangeable for all uses for which HFCS is

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[14] To illustrate the obvious error, the "functionally equivalent" test could place plastic knives and forks in the same "market or submarket" along with sterling silver knives and forks because both serve the same function; yet by virtue of the differences in price, use and other factors, no consumer would ever perceive that the two are reasonable substitutes, as the law requires for products to be in the same market or submarket.

suitable," but the court nonetheless refused to place them in the same market because "they are not reasonably interchangeable" in light of a 10%-30% higher price for sugar resulting from a government price support program. Similarly, the Eleventh Circuit, in an opinion expressly adopting the district court's reasoning, rejected functional interchangeability as a basis for placing both natural gas and LP gas in the same market because the price for LP gas was "roughly 100% higher" than natural gas, which negated reasonable interchangeability whenever both products were actually available to buyers.[15] The Second and Sixth Circuits have also rejected the functionally equivalent test.[16] This Court should resolve the conflict by repudiating the Third Circuit's position.

III. THE THIRD CIRCUIT IGNORED THE DECISIONS OF THIS COURT AND OTHER CIRCUITS REQUIRING PROOF OF INJURY TO COMPETITION AND RELATED ANTITRUST INJURY

In a Rule of Reason case such as this one, the plaintiff must establish injury to competition, *Monsanto*, 465 U.S. at 761; *National Society of Professional Eng'rs* v. *United States*, 435 U.S. 679, 690 (1978), plus related antitrust injury to the

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[15] *Consolidated Gas Co.* v. *City Gas Co.*, 665 F. Supp. 1493, 1516-17 (S.D. Fla. 1987), *aff'd*, 880 F2d 297 (11th Cir., 1989), *vacated for rehearing in banc*, 889 F.2d 264 (11th Cir.), *panel decision reinstated and affirmed*, 912 F.2d 1262 (11th Cir. 1990), *dismissed for mootness*, 111 S. Ct. 1300 (1991).

[16] *Borden, Inc.* v. *F.T.C.*, 674 F.2d 498, 507 (6th Cir. 1982) ("similarity of the end uses of the two products" is not sufficient to place them in the same market in light of "price . . . and quality differences"); *Hayden Pub. Co.* v. *Cox Broadcasting Corp.*, 730 F.2d 64, 70-71 (2d Cir. 1984) (evidence of functional equivalence cannot be a surrogate for proof of buyers' willingness to substitute the two products).

plaintiff's own business. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Indeed, the Third Circuit recognized that TINS' Section 1 Sherman Act claim "requires proof of two elements: concerted action and an unreasonable restraint of trade" (generally identified as injury to competition). But it then inexplicably stated that "[o]nly the first element concerns us here," 77A-78A, thus ignoring Armstrong's argument that the record fails to establish any injury to competition or related antitrust injury to TINS' own business. The Third Circuit's disregard of TINS' burden to establish both of these elements is flatly inconsistent with *Monsanto*, *Professional Engineers*, and *Brunswick*.

The lower court was compelled to disregard the injury-to-competition element because there was simply no evidentiary support in the record. In this case, evidence of injury to competition theoretically could occur at three levels: (1) the retailer level where subscriptions were sold to TINS' magazine; (2) the publisher level involving the operations of firms producing or capable of producing a TINS-type magazine; and (3) the distributor level where TINS solicited distributors to be sales agents of its magazine and where the only alleged restraint of trade occurred, based on Stern's decision not to sell TINS' magazine. Nothing in the record shows the requisite injury to competition at any of these levels.

At the retailer level, the Third Circuit correctly ruled, in dismissing TINS' Section 2 Sherman Act claims, that "we are left without record support to discern precisely how extensively [if at all] Armstrong has penetrated the video [magazine] market for retailers." 61A. Apart from this negative conclusion with respect to the retailer market, the Third Circuit made no other determination with respect to injury to competition at the retailer level.

At the magazine publisher level, the Third Circuit correctly ruled, in dismissing TINS' Section 2 claims, that there could be no injury to competition "even if Armstrong remains the only supplier in the relevant video market" after TINS' departure. 61A. This conclusion was required because "the record clearly proves that barriers to entry in the video market are extremely low" as demonstrated by the uncontradicted fact that "upon TINS' demise, two Armstrong distributors produced their own substitute video magazine to satisfy their retailers' full year subscription [with] . . . little capital . . . and minimal start-up time." *Id.*[17]

At the distributor level, which in fact was the only level of competition involved in Stern's decision not to distribute TINS' magazine, uncontradicted evidence conclusively negated any injury to competition. The Census Bureau reported 2,199 floor covering distributors in the United States in 1984 (JA8563), and TINS admitted that at least 450 of them were available to sell its magazine. JA1777. Of these, only 69 carried Armstrong's resilient product, and the alleged restraint was limited to just one (Stern) which sold only to retailers in the Connecticut area. By refusing to consider this data, the Third Circuit simply ignored Armstrong's contention that any restraint of Stern could not possibly have exceeded a *de minimis* effect upon competition at the distributor level.

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[17] *See, e.g., United States* v. *Columbia Steel Co.*, 334 U.S. 495, 510-11 (1948) (if "rolled steel producers can make other [rolled] products interchangeably with plates and shapes . . . injury to competition [should be measured] . . . by considering all comparable rolled products." Several courts of appeal have recognized and applied the same principle. *United States* v. *Baker Hughes, Inc.*, 908 F.2d 981, 988-89 (D.C. Cir. 1990); *Spectrofuge Corp.* v. *Beckman Instruments, Inc.*, 575 F.2d 256, 280-81 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979); *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.*, 512 F.2d 1264, 1271 (9th Cir. 1975). *See also In re Budd Co.*, 86 FTC 518, 571 (1975).

The Third Circuit's total disregard of these market realities stands in direct conflict with controlling decisions of this Court. In a vertical antitrust case, the "legality of arguably anticompetitive conduct should be judged primarily by its 'market impact'." *Monsanto*, 465 U.S. at 762; *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 330-34 (1961) (vertical foreclosure of less than 1% of market is *de minimis*).

The Third Circuit's ruling also directly conflicts with the decisions of other circuits. *See Great Escape Inc.* v. *Union City Body Co., Inc.*, 791 F.2d 532, 540 (7th Cir. 1986) ("[t]he principle that there is no anticompetitive effect when a buyer simply terminates one at will contract and enters into another, overrides any inference that might be drawn from [defendant's] market share"); *Havoco of America, Ltd.* v. *Shell Oil Co.*, 626 F.2d 549, 588 (7th Cir. 1980) ("loss . . . of a single contract with a single purchaser is simply not equivalent to a deleterious effect on the market"); *Dunn & Mavis, Inc.* v. *NU-Car Driveaway, Inc.*, 691 F.2d 241, 245 (6th Cir. 1982) ("Chrysler's substitution of one auto transport company for another at its Warren plant does not limit competition in any substantial sense").

With growing frequency, routine commercial disputes have spawned lawsuits, such as this one, that include parallel tort and antitrust claims based on the same business conduct.[18]

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[18] In recognition of this development, the Antitrust Section of the American Bar Association recently created a new committee responsible for keeping abreast of this area of law. Its first project was a report on this trend based on two surveys which indicated that "some form of claim labelled 'tortious interference' . . . filed along with antitrust claims" has been occurring "twice as frequently as the next most frequent" combination of tort and antitrust claims. Saferstein, *The Ascendancy of Business Tort Claims in Antitrust Practice*, 59 Antitrust L.J. 379, 385 (1991). The Committee's report concluded: "The trend of bringing state tort law claims in federal cases will undoubtedly continue." *Id.* at 387.

But federal antitrust claims should have no place in most of these lawsuits. Long ago the Court observed that the antitrust laws do "not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce." *Hunt* v. *Crumboch*, 325 U.S. 821, 826 (1945).

To give force to this general principle the Court should grant the writ in this case and provide legal criteria allowing district courts, after appropriate discovery, to dismiss federal antitrust claims based on a routine commercial dispute which has no significant impact on competition. Conduct such as Roth's statement, as well as Stern's decision not to handle a new product, occurs in the course of normal business operations involving thousands of transactions each day. It should require no more than a "twinkling of an eye" for a district court to conclude that a disappointed supplier's loss of one local distributor in Connecticut, when hundreds of other distributors are available, cannot injure competition in a market stipulated to be nationwide.[19] Nor can there be any "antitrust injury" to the disappointed supplier since loss of business following routine sales talk by another supplier is the quintessence of competition. *Brunswick*, 429 U.S. at 477.

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[19] *Cf. NCAA* v. *Board of Regents*, 468 U.S. 85, 110 n.39 (1984) (commending a "twinkling of an eye" analysis where the competitive effect of the business practice is clear on its face, *quoting* P. Areeda, The "Rule of Reason" in Antitrust Analysis 37-38 (Fed. Judicial Center, June 1981)).

CONCLUSION

The Court should grant the writ and summarily reverse with respect to the vertical conspiracy question presented. Alternatively, the Court should grant the writ with respect to all three questions and set the case for briefing and oral argument.

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Supreme Court, U.S.
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No. 92-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ARMSTRONG WORLD INDUSTRIES, INC.,

Petitioner,

v.

THE INDUSTRY NETWORK SYSTEM, INC. AND ELLIOT FINEMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX TO THE PETITION

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5613

ELLIOT FINEMAN; THE INDUSTRY NETWORK SYSTEM, INC.

Appellants

vs.

ARMSTRONG WORLD INDUSTRIES, INC.

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 84-03837)

Argued
March 3, 1992
Before: STAPLETON and MANSMANN, *Circuit Judges*, and
FULLAM, *District Judge*.*

(Filed October 28, 1992)

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* Honorable John P. Fullam of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

In a civil action brought in the United States District Court for the District of New Jersey, an entrepreneur, Elliot Fineman, and his corporation, The Industry Network System, Inc. (TINS), sought to recover against Armstrong World Industries, Inc., a prominent manufacturer of floor covering products, for losses sustained after TINS folded. Conceived in late 1983, the TINS concept employed novel video technology to produce a monthly videotape magazine for retailers of floor covering products to be sold through distributors. Fineman contended that Armstrong, anticipating the launching of its own videotape network, interfered with TINS' prospective contract with an Armstrong floor covering distributor to distribute the TINS video magazine. As a result of losing this contract, TINS lacked the cash flow necessary to continue in business and folded. Fineman, formerly an industry consultant, allegedly suffered injury to his reputation that destroyed his consulting business. Additionally, Fineman and TINS asserted that Armstrong, a leading manufacturer of resilient floor coverings, coerced its distributors to refuse to deal with TINS by employing its alleged leverage in the resilient floor covering market to eliminate TINS and to gain a competitive advantage in the secondary market of videotape magazines. Having cleared from the field an early competitor, Armstrong prepared, according to Fineman, to enter the videotape magazine market unencumbered by competition.

Armstrong argued in defense that TINS' opportunities for success were specifically limited by its

allegedly inferior product, high pressure sales tactics or poor business projections. In general, Armstrong implied that the risk inherent in starting any small business is further heightened in the magazine industry, where start-up costs and barriers to entry are low and competition is, consequently, stiff.

The jury agreed with TINS and Fineman, rendering a verdict for them on the tort and the antitrust claims, including the imposition of punitive damages. The district court, in part assessing the strength of the evidence differently, granted judgment notwithstanding the verdict,[1] and in the alternative, a new trial.

With respect to the judgment n.o.v., the parties dispute whether the plaintiffs have proven their tortious interference claims, are entitled to punitive damages on that claim and whether Armstrong exercises monopoly power in the resilient floor covering market, a prerequisite to TINS' Sherman Act section 2 claim. They also contest the district court's grant of a directed verdict for Armstrong on TINS' section 1 claim, specifically, whether the meeting of the minds required to establish a claim of concerted action under section 1 of the Sherman Act requires a shared motive. Finally, TINS challenges the grant of summary judgment to Armstrong on TINS' contract claim, disputing Armstrong's obligations under the 1984 TINS-Armstrong Settlement Agreement. We will address the judgment n.o.v., new trial, directed verdict and summary judgment orders in that sequence.

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[1] Since this trial and all subsequent motions occurred prior to the amendment of Rule 50 providing for judgment as a matter of law, in this opinion we will employ the traditional terminology of directed verdict and judgment notwithstanding the verdict that was in effect until December 19, 1991.

I. *Jurisdiction*

The district court exercised subject matter jurisdiction over the Sherman Antitrust Act claims, 15 U.S.C. §§ 1 and 2 (Counts 1 and 2), and pendent jurisdiction over the remaining state law claims: breach of contract (Count 3); tortious interference with contract under New Jersey law (Count 4); New Jersey antitrust claims (Count 5) and Armstrong's counterclaim averring that the plaintiffs engaged in civil conspiracy.

We exercise appellate jurisdiction over the final order of the district court granting judgment n.o.v. for Armstrong on the tortious interference, Sherman Act section 2 and New Jersey antitrust claims; dismissing Fineman's individual monopoly claim, the Sherman Act section 1 claim, the breach of contract claim, and Armstrong's counterclaim; and alternatively granting a new trial on the tort and section 2 claims.

II. *Facts*

A. *The Parties*

A brief introduction into the structure of the floor covering distribution scheme, and Armstrong's specific characteristics, will serve as useful background for understanding the discrete conflicts at issue here. Later, we will detail the facts relevant to each legal issue. A thorough review of the record is necessary because this appeal is so fact specific. The following recitation reviews undisputed facts or casts the facts in the light most favorable to the verdict winners, the plaintiffs.

Floor coverings are distributed to retailers from manufacturers through distributors, also known as wholesalers. Floor covering distributors may often be "captive" to their manufacturers, carrying only that manufacturer's line of one particular product. This is frequently the case with Armstrong's distributors of its resilient floor coverings. This captivity appears to be limited to product lines; thus, a distributor may carry only Armstrong's resilient line but a different manufacturer's carpet or ceramic tile line. For purposes of this opinion, an "Armstrong distributor" denotes a distributor that is "captive" to Armstrong for its resilient line but may also carry non-Armstrong non-resilient lines. It also bears emphasis that Armstrong does not possess any ownership interest in its distributors. On this record, a typical Armstrong distributor depends upon Armstrong for 95% of its resilient business[2] but 50% of its overall business.

By contrast, *retailers*, who range from "mom and pop" outfits to chain floor covering retailers to other retailers that carry floor covering as a sideline, *e.g.*, furniture, hardware, wallpaper and paint stores, and lumberyards, generally carry various brands; they purchase floor covering products from competing distributors. Depending upon the manufacturer and the specific product line, retailers may choose to buy from distributors competing within the same manufacturer's product line. Armstrong, for example, promotes intrabrand competition for its resilient line by supplying resilient to multiple distributors within any given territory. Thus distributors vigorously compete for retailer loyalty, floor space and displays, in large part because they have very little flexibility in pricing their products. Distributors vie for sales by offering "specials" or "promotions"

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[2] The remaining 5% of its resilient business might consist of sales of adhesive products or other accessory products that are not supplied by Armstrong.

on items, which are frequently financed by the manufacturers. In addition, some retailers purchase directly from manufacturers, although Armstrong deals exclusively through its distributors.

1. *Armstrong World Industries, Inc.*

During the relevant 1983-1984 time period, Armstrong World Industries, Inc., manufactured both carpet and resilient floor covering products.[3] "Resilient" is the industry name for vinyl floor coverings, manufactured in either sheeting or tile form, and most commonly identified with the brand name "linoleum." Resilient constitutes only one of many types of "hard" floor coverings, including wood, ceramic tile, and natural floor coverings such as stone and marble. In industry jargon, "hard" floor coverings are distinguished from "soft" floor coverings, familiarly referred to as carpeting.

Armstrong's dual corporate structure flowed from its two floor covering products and consisted of twin carpet and resilient divisions. At the regional level, each division maintained its own district managers and sales force. During the relevant time period, Robert Roth served as the New York area district manager for Armstrong's resilient division and Robert Guzinsky was Roth's counterpart in Armstrong's carpet division. These men appear to have had little horizontal contact, except, for example, when a distributor carrying both lines required some financial counseling or advice from its respective district managers.

At the distributor level, however, one significant difference between the two Armstrong divisions is apparent.

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[3] Armstrong has since sold its carpet division and has added a ceramic tile line.

Armstrong sells to any number of resilient distributors within a defined geographic territory, which fosters keen competition among Armstrong's own distributors as well as with other manufacturer's distributors. Armstrong's carpet division, on the other hand, grants exclusive territorial rights to each of its carpet distributors, thereby insulating them from intrabrand competition.

2. *Elliot Fineman and TINS*

Elliot Fineman began his career in the floor covering industry in 1963 as a salesman for a New York area carpet retail company, Benjamin Berman. During his fourteen year tenure at Berman, in which he worked his way up to the position of president, he developed a unique inventory control system. J.A. at 1565-7; 6398-6404. In 1977, Fineman left Berman to start a consulting business, Cost-Free Internal Profits Systems (CFIPS), largely premised on this inventory control system. As Gail Farrer, a TINS principal who followed Fineman from Berman to CFIPS explained, CFIPS aimed to achieve increased profitability from inside a floor covering distributor's company by reducing inventory and the costs associated with maintaining an excessive amount of inventory. J.A. at 3359-60. Fineman explained that a distributor's profits are a matter of pennies on the dollar so that reducing the cost of maintaining inventory could be quite profitable. Fineman testified that CFIPS charged an average consulting fee of $200,000 and guaranteed its client's satisfaction. J.A. at 1587-90.

In 1982, Fineman originated the TINS concept, a monthly magazine in the form of a videotape targeted to floor covering retailers. After conducting market studies confirming support for the idea, he launched the TINS magazine in August 1983. J.A. at 1646. The TINS magazine included four regular

segments: 1) a journalist's report on industry trends; 2) Fineman's interview of an expert on key business topics; 3) Farrer's segment highlighting a successful retailer and its tips for success; and 4) the distributor's "tag," a personalized segment in which each distributor would communicate with its retail customers. The advantage of the tag lay in offering promotions, or discounted specials, to the retailer. Retailers typically were supplied by several distributors, so that those offering retailers additional promotions could expect to reap a competitive advantage. According to Fineman, the tag also reduced overhead costs associated with promotions because it enabled distributors to reach their retailers efficiently and simultaneously, and eliminated the need for individual visits to each retail customer.

Fineman's corporation, The Industry Network System (TINS), marketed its monthly video magazine to floor covering retailers through their distributors. TINS conducted sales training for each distributor prior to "launching" an intensive four to six-week sales effort by that distributor's sales force. In exchange for paying a marketing rights fee to TINS, these distributors were promised commissions or royalties based upon subscriptions and video equipment sold.[4] In addition, Fineman assured the distributors that their tags would generate increased sales without additional overhead, thus yielding substantial "incremental profits."

Because Armstrong distributors typically employ more salespersons than distributors of other floor covering products, TINS especially targeted them as its distributors. TINS asserts that signing up *Armstrong* distributors for TINS

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[4] TINS entered into an agreement with RCA to have RCA supply televisions and video cassette recorders at a discounted price. Both the distributor and TINS received commissions on these equipment sales.

was critical: in addition to being a leading manufacturer of resilient, Armstrong distributors typically maintain a sales force specialized in selling only Armstrong products. For this reason, Armstrong distributors by and large employ more salespersons than non-Armstrong distributors, ensuring TINS access to a greater number of retailers through Armstrong distributors.

TINS successfully signed up two Armstrong distributors. When a third prospect voiced concern that Armstrong might not approve of TINS, Fineman contacted Armstrong's Lancaster, Pennsylvania headquarters and on September 7, 1983, spoke to James Humphrey, Armstrong's general manager of Sales and Marketing for the Floor Division, to explain the TINS format and its potential for Armstrong distributors. *See* J.A. at 7518 (Humphrey's handwritten notes of conversation outlining TINS format and naming distributors contacted). Fineman testified that at this time he was unaware of Armstrong's plans to enter the video market but he later learned that Armstrong was several years behind TINS in the development of a video network. J.A. at 1898-1901.

Humphrey voiced four concerns about TINS to his superior, Dennis Draeger, Armstrong's vice president of floor covering operations. First, TINS' offers of exclusive territory to distributors might conflict with Armstrong's policy of not favoring any single distributor within a geographic area, or maintaining a "level playing field" among its distributors. Second, Humphrey believed that involving Armstrong's distributor's salespersons in selling TINS would interfere with Armstrong's strong preference for maintaining specialized sales forces. Third, the TINS magazine would highlight many products that competed with Armstrong's. Fourth, Armstrong voiced concern over equipment incompatibility. It had plans for a video program that would employ Sony "Betamax" equipment

whereas the TINS magazine used a VHS format. J.A. at 3735-36.

Subsequent to this telephone call, Humphrey disseminated the following memorandum to Armstrong's Floor Division District Managers on September 12, 1983:

> There is a possibility some of your wholesalers might contact you regarding a new video based retail floor covering communication program being introduced called "TINS." The program is being presented to independent wholesalers throughout the country for sale to floor covering retailers in specific territories. The objective is to establish a network of retailers who will utilize various video based programs on a monthly basis. The system would also allow for some localized wholesaler presentation, which the wholesaler must produce locally.
>
> We feel the "TINS" program will require a considerable amount of selling time on the part of wholesaler salesmen, which could be better utilized selling [Armstrong products]. At the same time, we feel this program conflicts with our future video plans and would not prove to be in our best interest.
>
> We have heard that the organization selling "TINS" has stated that several Armstrong wholesalers have already purchased the system and will be selling it

> to their customers. To the best of our knowledge, no Armstrong Floor Division wholesaler has committed to the "TINS" system. Some have been approached; however, they haven't agreed to merchandise the system.

J.A. at 7280. A September 27, 1983 memo from Armstrong's New York Regional Manager of the Carpet Division, Robert Guzinsky, to his distributor sales managers parroted much of Humphrey's memo.[5] A third memorandum sent to Armstrong

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[5] Guzinsky's memo read, in pertinent part:

> There is a possibility that some of you may be contacted regarding a new video based retail floorcovering communications program being introduced called "TINS." The program is being presented to independent wholesalers throughout the country for sale to floorcovering retailers in specific markets. The objective is to establish a network of retailers who will utilize various video based programs on a monthly basis. The system would also allow for some localized wholesaler presentation, which the wholesaler must produce locally.
>
> We feel the "TINS" program will require a considerable amount of selling time on the part of your wholesaler salesmen, which I know you would agree, could be better utilized selling [Armstrong products]. At the same time, we feel this program conflicts with our mutual video plans and would not prove to be in our mutual best interest.
>
> We have heard that the organization selling "TINS" has stated that several Armstrong wholesalers have already purchased the system and will be selling it to their customers. To the best of our knowledge, no Armstrong wholesaler has committed to the "TINS" system. Therefore, if you receive any queries, you will have this information.
>
> We are working constantly to develop logical video systems such as the program you will be showing shortly to your carpet Studios and feel we can satisfy both our needs in this area.

marketing representatives in the Detroit area from their district manager, dated October 23, 1983, was largely excerpted from Humphrey's memo.[6] J.A. at 7591.

Fineman responded, in the fall of 1983, by threatening Armstrong with an antitrust lawsuit. The dispute culminated in a settlement agreement. Drafted in January 1984,

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J.A. at 7286.

[6] District Manager Csrnko wrote:

> We have been advised via Lancaster that there is a possibility that some of our wholesalers, if not all, might be contacted regarding a new video based retail floor covering communication program being introduced called "TINS." This program is being presented to independent wholesalers throughout the country for sale to floor covering retailers in specific territories. The objective is to establish a network of retailers who will utilize various video based programs on a monthly basis. The system would also allow for some localized wholesaler presentation, which the wholesaler *must* produce locally.
>
> We obviously feel the "TINS" program will require a considerable amount of selling time on the part of wholesaler salesmen, which could be better utilized selling [Armstrong products]. At the same time, we feel this program conflicts with the future video plans and certainly would not prove to be in our combined best interests.
>
> The organization selling "TINS" has stated that several Armstrong wholesalers have already purchased the system and will be selling it to their customers. To the best of our knowledge, no Armstrong Floor Division wholesaler has committed to the "TINS" system. Some have been approached; however, they haven't agreed to merchandise the system. Therefore, if you receive any inquiries regarding "TINS," please try to discourage your wholesalers [sic.] participation and offer suggestions on how their time could be directed towards [sic.] a more important Armstrong sales effort. Additionally, please notify me as soon as the offer has been made to your wholesaler. I want to make sure we all stay on top of this competitive effort.

J.A. at 7591.

the settlement agreement was signed by Fineman in March of 1984, after a "trial period" in which Fineman signed up three Armstrong distributors and satisfied himself that Armstrong would not continue to interfere with his marketing of TINS. In general terms, the settlement agreement required Armstrong Vice President Dennis Draeger to notify Armstrong's district managers that it had no objection to TINS and required him to send a letter to a list of its distributors explaining that it had no objection to their distributing the TINS magazine. In addition, Fineman could request that Armstrong send a similar letter to prospective TINS distributors.

3. *Stern & Company*

At the crux of this lawsuit is an Armstrong distributor's change of heart with respect to the TINS magazine. On May 24, 1984, after TINS' settlement negotiations with Armstrong, Fineman and TINS salesman John Wolfe met with Alan Abrahamson, president of Stern & Company, and with Stern's three sales managers: Ken Cloud, John Fischer, and Gray Owen. After receiving Fineman's sales pitch, Abrahamson and his sales managers conferred and agreed to distribute TINS. Abrahamson testified that his sales managers were divided in their support for TINS: Fischer, the resilient sales manager, did not favor TINS, Owen, the carpet manager, slightly favored TINS; and Cloud, the new ceramic manager, highly favored TINS. J.A. at 4286. Abrahamson favored TINS and agreed to sign the letter of intent. *See* J.A. at 7865.

Fineman assessed distributor marketing rights for Stern at $16,000. After Abrahamson explained that Stern was undergoing some financial difficulty, Fineman required only a 25 percent down payment on that day, J.A. at 1712, which constituted half of the standard 50 percent down payment ordinarily required at the time of the signing of the letter of

intent. The balance was to be paid within four to six months. Abrahamson testified that he understood that the royalties from TINS sales received in the first six months would cover the initial $16,000 distributor rights fee. J.A. at 4290. There is no dispute that Stern would not receive exclusive marketing rights for TINS within its sales territory. J.A. at 4427. At that time Fineman and Abrahamson also discussed CFIPS and Abrahamson indicated his interest in receiving a proposal from Fineman for consulting work.

As will later be detailed at length, Abrahamson informed TINS' John Wolfe, following the TINS sales training of Stern's salesmen, that Stern was withdrawing from TINS. TINS relies heavily for its tortious interference and antitrust conspiracy claims on two communications from Armstrong that intervened between Stern's letter of intent and discontinuance of the TINS program. First, during a June 7th meeting, at which Abrahamson and Armstrong's regional sales manager for resilient Robert Roth were present, TINS was discussed for approximately 10-15 minutes, and Roth told Abrahamson that TINS would not "mak[e] a lot of sense in the Armstrong scheme of things" because Armstrong has an "overlap program." J.A. at 4084.[7] Second, Armstrong executive Humphrey sent a memo dated June 12, 1984, to all Armstrong floor division managers explaining what field managers should tell distributors about Armstrong's "participation" with TINS: that Armstrong would be "unable to offer any assistance" to that distributor. J.A. at 7323.

As a result of Stern's withdrawal, TINS lacked the capital required to produce the videotapes already under

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[7] Armstrong's local sales manager for carpet, Robert Guzinsky, also at the meeting, reportedly told Abrahamson that TINS "sounds like a good idea" J.A. at 4048.

contract. TINS ultimately was forced to dissolve its operations. Fineman then threatened to sue Stern for breach of contract and Stern threatened to counterclaim on the basis that TINS had violated the registration and disclosure requirements of the Connecticut Business Opportunity Investment Act, Conn. Gen. Stat. §§ 36-503 to 36-521, and that the Connecticut Act barred TINS from enforcing the letter of intent. J.A. at 8553-55. TINS and Stern settled their dispute on August 9, 1984, and executed a mutual release of liability. J.A. at 8557.

B. *Procedural History*

In September of 1984, Fineman and TINS filed suit against Armstrong World Industries, Inc. in the United States District Court for the District of New Jersey, alleging generally that Armstrong had influenced Stern to breach its contract with TINS in an effort to drive TINS from the market for video magazines in the floor covering industry. In a five count complaint, the plaintiffs sought compensatory, punitive, and treble damages as well as interest, costs, attorneys fees and injunctive relief.

Count One alleged that Armstrong had violated section 1 of the Sherman Act by "pressur[ing], persuad[ing] and otherwise influenc[ing] its independent distributors not to deal with, and indeed to break agreements with, the plaintiffs, thereby cutting off a critical supply of distributors to the plaintiffs." Compl. ¶ 25. Count Two alleged a violation of section 2 of the Sherman Act, asserting that Armstrong possessed monopoly power in the resilient floor covering market which it exercised in an attempt to monopolize a market defined as "consist[ing] of the sale of video magazines to retailers of the floor covering industry [and other interested entities]." Compl. ¶¶ 8; 31-32. For the remaining counts, brought pursuant to the laws of New Jersey and Pennsylvania, the plaintiffs asserted the

federal court's pendent or diversity jurisdiction. Count Three alleged that Armstrong's conduct constituted a breach of the 1984 settlement agreement between TINS and Armstrong. Compl. ¶ 35. Counts Four and Five alleged intentional interference with contract, Compl. ¶ 37, and a violation of the New Jersey antitrust laws, respectively. Compl. ¶ 39. During trial, when Fineman pressed individual antitrust and tort claims that had not been clearly delineated as counts in the complaint, the district court ruled that the complaint fairly stated Fineman's individual tortious interference claim but rejected his individual antitrust claims.

On May 25, 1988, the district court granted partial summary judgment in favor of Armstrong, dismissing the breach of contract claim and all claims related to Armstrong distributor Nelson & Small. A lengthy jury trial then ensued and at the close of plaintiffs' case, the district court directed a verdict for Armstrong on the Sherman Act section 1 claim, concluding that as a matter of law, co-conspirators in a vertical relationship with one another could not share the requisite anticompetitive motive for an agreement prohibited under section 1. The district court dismissed Fineman's individual antitrust claims, a ruling which has not been appealed, but permitted the jury to decide Fineman's individual tort claim, although the court excluded punitive damages on that claim. J.A. at 6828-29.

On April 19, 1991, the jury returned a verdict for the plaintiffs on all the remaining counts. Specifically, it awarded $19.5 million to TINS on its section 2 antitrust claims and $17.7 million to TINS and $2.275 million to Fineman, individually, on their respective tortious interference claims.[8]

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[8] The district court merged the state law antitrust claims with the Sherman Act claims.

The jury also awarded TINS punitive damages of $200 million. Subsequently, the district court ordered that when the judgment became completely final after all post-trial motions and appeals, TINS would have to elect to recover damages under either the antitrust or the tort causes of action. Finally, in a ruling not challenged on appeal, the district court dismissed Armstrong's counterclaims against TINS and Fineman. J.A. at 89-108.

On June 20, 1991, the district court granted Armstrong's motion for judgment n.o.v. on the tort and antitrust claims which the jury resolved in favor of the plaintiffs. *Fineman v. Armstrong World Indus., Inc.*, 774 F. Supp. 225 (D.N.J. 1991). In the alternative, the district court also conditionally granted a new trial because it found that the verdict was against the weight of the evidence and that the plaintiffs' trial counsel's improper summation grossly prejudiced and inflamed the passions of the jury. The plaintiffs appeal from these final orders requesting essentially that we reinstate the jury's verdict. We turn, initially, to the entry of judgment n.o.v., which we will reverse in part, and then, in Part V, to the alternative grant of a new trial, which we will affirm.

III. *Tortious Interference*

In this section, we address the tortious interference claims. In Part A, we discuss the question of whether Armstrong waived its grounds for judgment n.o.v. In Part B, we deal with the defendant's contention that the TINS/Stern settlement bars any claims arising out of these facts. Part C begins our substantive discussion of the tort claim and in Part D we examine a Connecticut statute to determine whether the plaintiffs have satisfied the element of reasonable expectation of economic advantage. In Part E, we reach the question of the

sufficiency of the evidence on the tort claims, and in Part F, we address Fineman's individual tort claim; and finally, in Part G, we address punitive damages.

A. *Waiver*

The plaintiffs pose a threshold procedural question: whether Armstrong properly preserved its contention that TINS and Fineman individually failed to present sufficient evidence of their tortious interference claims such that the district court's grant of judgment n.o.v. on these grounds violated the plaintiffs' Seventh Amendment right to a jury trial. Because the claims of each plaintiff were addressed separately at trial, we will discuss each in turn.

1. *TINS*

The district court reasoned that judgment n.o.v. on TINS' tortious interference claim was appropriate because TINS had failed to prove that the Connecticut Business Opportunity Investment Act did not bar its tort claim and because TINS had not produced sufficient evidence of wrongful conduct by Armstrong nor that this conduct was the proximate cause of its injury. On appeal, TINS contends that Armstrong failed to preserve these issues in its oral motion for directed verdict. The district court concluded that it had preserved these grounds. *Fineman*, 774 F. Supp. at 230.

In order to preserve an issue for judgment n.o.v., the moving party must timely move for a directed verdict and specify the grounds for that motion. FRCP 50(a); *Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802, 814 (3d Cir. 1984), *cert. denied*, 477 U.S. 908 (1986); *Mallick v. Int'l Bhd. of Elec. Workers*, 644 F.2d 228 (3d Cir. 1981); *Orlando v. Billcon Int'l, Inc.*, 822 F.2d 1294, 1298 (3d Cir. 1987). Absent

a motion in accordance with Federal Rule of Civil Procedure 50(a), judicial reexamination of the evidence abridges the plaintiff's Seventh Amendment right to a trial by jury. As explained in *Lowenstein v. Pepsi-Cola Bottling Co.*, 536 F.2d 9, 11 (3d Cir.), *cert. denied*, 429 U.S. 966 (1976), to enter a judgment notwithstanding the verdict in the absence of a proper motion for a directed verdict "is simply to ask the court to reexamine the facts already tried by the jury and this the court may not do without violating the Seventh Amendment."

Requiring compliance with Rule 50(a)'s commandment that "[a] motion for a directed verdict shall state the specific grounds therefor" additionally ensures that the party bearing the burden of proof will have an opportunity to buttress its case before it goes to the jury and the moving party will not gain an unfair advantage through surprise. *Orlando*, 822 F.2d at 1294; *see Levinson v. Prentice-Hall, Inc.*, 868 F.2d 558, 562 (3d Cir. 1989) (the purpose of moving for a directed verdict before judgment notwithstanding the verdict is to afford the opposing party an opportunity to cure defects in its proofs prior to submission of the case to the jury); *see also Bradford-White Corp. v. Ernst & Whinney*, 872 F.2d 1153, 1161 (3d Cir.), *cert. denied*, 493 U.S. 993 (1989).

TINS does not suggest that Armstrong failed to request a directed verdict timely; indeed the record reflects that Armstrong orally moved for a directed verdict at both the close of the plaintiffs' case and at the close of all of the evidence. J.A. at 3612; 6716. Rather TINS rests its waiver argument on the second requirement, namely that Armstrong failed to specify adequately that with respect to TINS' tortious interference claim, its motion rested partly upon insufficiency of the evidence.

The record reveals that Armstrong's counsel moved for a directed verdict at the close of the plaintiffs' case

on grounds that the record was critically deficient of evidence of coercion and that the tort claims could not be maintained in light of the Connecticut Act. Although the oral argument on this directed verdict motion focused primarily on the effect of the Connecticut Act and the antitrust claims, Armstrong's counsel stated that "I will come back to the factual aspects of our position [on] the inducement claim. We don't believe there is sufficient evidence of coercion here to sustain that claim." J.A. at 3587-88. During the course of that argument, Armstrong's counsel did not return to that contention in the context of discussing the tort claim. Later, during the oral argument on its renewed motion for directed verdict at the close of all of the evidence, Armstrong returned to the theme that the plaintiffs had not adduced evidence that Armstrong's conduct did not constitute legitimate business activity. J.A. at 9103. Although this issue was raised in connection with the antitrust claim, it also applied to the argument concerning the tort claims. The record thus clearly supports the district court's conclusion that Armstrong had properly preserved each of these grounds. *Fineman*, 774 F. Supp. at 230.

While it is true that Armstrong's counsel could more clearly have identified the grounds for directed verdict by intoning the words "insufficiency of the evidence on the tortious interference claim," or more elaborately arguing that ground, we conclude that Armstrong's counsel did argue the factual components of an insufficiency of the evidence claim in terms which adequately apprised the district court and plaintiffs' counsel of the reasons for its motion. Because Armstrong raised the factual components, plaintiffs' counsel was clearly on notice of the legal rubric under which Armstrong planned to proceed.

This case is distinguishable from *Orlando*, in which the motion for directed verdict was premised solely upon a liability issue but judgment n.o.v. was sought on a damages

issue. *Orlando*, 822 F.2d at 1298. Our reasoning in *Orlando*, that the plaintiff was not given notice that the adequacy of the proof of damages was disputed since the motion for directed verdict rested solely on the insufficiency of the evidence to prove unlawful interference, *id.*, is not implicated here. Rather, this case more closely follows *Acosta v. Honda Motor Co. Ltd.*, 717 F.2d 828 (3d Cir. 1983). In *Acosta* we recognized that defense counsel should have been more explicit in stating the grounds for its directed verdict motion. We nonetheless held that the communicative content, "'specificity' and notice-giving function of an assertion should be judged in context." *Id.* at 832 (citation omitted). Moreover, we noted that plaintiff's counsel and the district court had both "understood and responded" to defense counsel as if he *had* been more specific. *Id.* The same is true in this case where the district court ruled, prior to acquiring a transcript, that the issues had been preserved.

2. *Fineman Individually*

With respect to his individual tortious interference claim, Fineman contends that Armstrong also failed to preserve the issue of insufficiency of the evidence in its motion for directed verdict. The resolution of this claim rests upon the unique factual circumstances here and the evolution of Fineman's individual tort claim during the trial. Armstrong responds that Fineman posed his individual claim for tortious interference for the first time after the district court dismissed his individual antitrust claims, which followed the close of the plaintiffs' case and Armstrong's initial timely motion for directed verdict. In support of this position, Armstrong contends that both the complaint and the pretrial statement contain only an individual *antitrust* claim and that Fineman retooled his individual claim to aver tortious interference after the district court dismissed his individual antitrust claim. Because the individual tort claim surfaced after Armstrong's

initial directed verdict motion, Armstrong contends that it could not have waived its objections at that time.

Although Fineman's individual tort claim may have been inartfully pleaded,[9] by April 1, 1991, after several months of trial, the district court had ruled that it was a viable claim, prompting Armstrong, during its renewed motion for directed verdict at the close of all the evidence, to raise "two main grounds": (1) Fineman was not a party to the Stern-TINS contract, and (2) New Jersey law does not provide for a tortious interference claim by a non-party. J.A. at 9057-58.[10] Given the manner in which this claim developed at trial, we cannot fault Armstrong for having failed to move for directed verdict upon this claim until the close of the evidence and hold that

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[9] Paragraph 28 of the Complaint, falling under a section entitled "Count I" (the section one antitrust claim) provides:

> [as a result of Armstrong's conduct], plaintiff Fineman's reputation as a management consultant, in fact one of the leading management consultants in the floor covering industry, was severely damaged. He was thus eliminated as a credible force in assisting distributors to reduce their inventory levels, thus permitting Armstrong to sell to its distributors more inventory than they actually needed. It is extremely damaging to a management consultant to have suffered an insolvency, given the nature of such a profession. Confidence in such a person is lost if it is known that the consultant's own business went under.

In addition the pretrial statement includes in the plaintiffs' statement of legal issues the following: "Plaintiff Fineman is entitled to an award of lost earnings or profits from his consulting business." J.A. at 780. The district court ruled that both the Complaint and pretrial statement adequately averred Fineman's individual tortious interference claim. J.A. at 6827.

[10] Armstrong's counsel prefaced this statement of the issues with an assertion that he had "nothing really to add that's not in our brief." A search of the docket sheet in the district court reveals that this document was not filed with the Clerk's office and therefore does not appear of record. For that reason we have before us only the oral statement of the two grounds for directed verdict.

these grounds for judgment n.o.v. on this claim were adequately preserved.

B. *The TINS-Stern Settlement*

Before reaching the merits of the tortious interference claim, we must also briefly address Armstrong's contention that the plaintiffs' tort claims are barred by the TINS-Stern release executed in the fall of 1984. After Fineman threatened to sue Stern for the additional $4,000 unpaid deposit, Stern voided the letter of intent, threatened to report TINS to the Connecticut Commissioner of Banking for failing to register under the Connecticut Act, and threatened to counterclaim for the return of Stern's $4,000 deposit. J.A. at 4328-30; 8553-55. TINS and Stern ultimately executed a mutual release of all claims arising out of the letter of intent, in which TINS received $1.00 "and other good and valuable consideration." J.A. at 8556-58; 8557. This settlement released Stern and its "assigns" without mention of Armstrong.

Armstrong suggests that where two parties to a contract enter into a settlement agreement mutually discharging them from any liability under the contract, one of those parties may not then seek recovery against a third party for tortious interference with that contract. Armstrong has not provided any New Jersey caselaw to support its position and we conclude that the New Jersey Supreme Court would not bar this action.

The New Jersey Supreme Court has evidenced its preference to permit an injured plaintiff the opportunity to settle with one tortfeasor without jeopardizing its ability to seek nonduplicative recovery from another tortfeasor. In *Breen v. Peck*, 146 A.2d 665 (N.J. 1958), involving tortious interference with a brokerage agreement, the New Jersey Supreme Court ruled that the plaintiff could seek recovery against one joint

tortfeasor after settling with the other joint tortfeasor. It rejected the English Release Rule, under which settlement with one tortfeasor precludes subsequent recovery from any other joint tortfeasors, reasoning that that rule shortchanges the claimant and overcharges the person who settles. *Id.* at 668. Adopting a view attuned to encouraging fair settlements, the court in *Breen* ruled that a plaintiff could sue non-settling tortfeasors until full satisfaction was obtained. *Id.* at 672-73. The rationale of *Breen* entitles a plaintiff "to pursue all those who are independently liable to him for his harm until one full satisfaction is obtained." *McFadden v. Turner*, 388 A.2d 244, 246 (N.J. App. Div. 1978).

There is no claim that TINS received full satisfaction from the release with Stern. Whereas TINS threatened suit against Stern for $4,000 (the half of Stern's deposit that had been deferred) and Stern threatened to counterclaim for the $4,000 it had paid, TINS sought much more than $4,000 in lost profits as consequential damages for the destruction of its business as an alleged result of Armstrong's interference. Thus Armstrong's reliance upon *IMAF S.p.A. v. J.C. Penney Co.*, 1991 U.S. Dist. LEXIS 5361 (S.D.N.Y. Apr. 24, 1991) in support of its theory of a bar is misplaced. There the identical damages had been sought against both the breaching party and the tortfeasor, and the court determined that by its own terms the settlement expressly provided that IMAF was fully compensated even though it had not received payment.

Given New Jersey's strong policy in favor of permitting an injured party to seek full recovery from each tortfeasor, we decline to invoke a contrary rule from a different jurisdiction. *See Swift v. Beaty*, 282 S.W.2d 655, 659 (Tenn. App. 1954). We conclude that the plaintiffs are not barred by

the TINS-Stern settlement from bringing their tortious interference claims against Armstrong.

C. *Tortious Interference Claims Under New Jersey Law*

We turn now to the substance of the tortious interference claims, which are governed by New Jersey law. Under New Jersey law, the five elements of a claim of tortious interference with a prospective business relationship are: (1) a plaintiff's reasonable expectation of economic benefit or advantage, (2) the defendant's knowledge of that expectancy, (3) the defendant's wrongful, intentional interference with that expectancy, (4) in the absence of interference, the reasonable probability that the plaintiff would have received the anticipated economic benefit, and (5) damages resulting from the defendant's interference. *Printing Mart-Morristown v. Sharp Elec. Corp.*, 116 N.J. 739, 563 A.2d 31, 37 (N.J. 1989); *see* Restatement (2d) of Torts §766B.

Armstrong does suggest, however, that in a competitive business context a plaintiff asserting a claim of tortious interference must meet a heightened evidentiary requirement akin to the proof required for an antitrust claim. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981). In the antitrust arena, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita*, 475 U.S. at 588 (explaining the holding in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)). Where a defendant's allegedly illegal activity may stem from either procompetitive or anticompetitive objectives, inquiry must be made to determine whether a permissible inference can be drawn in favor of the plaintiff. *See, e.g., Matsushita*, 475

U.S. at 590 (a twenty-year conspiracy to set predatory prices could not be logically inferred because the losses sustained could never have been recouped); *Monsanto*, 465 U.S. at 765 (an illegal conspiracy to eliminate a competitor could be permissibly inferred on that record). Armstrong asserts that neither federal antitrust nor New Jersey tort laws were intended to stifle competitive activity; thus, a heightened evidentiary standard will provide protection from liability to defendants who simply engaged in the pursuit of legitimate marketplace competition.

Analogizing to antitrust cases, Armstrong alleges that the requirement of "'wrongful' conduct involving 'malice', which is defined as the intentional doing of a wrongful act 'without justification or excuse'" interjects a heightened standard into a tortious interference claim under New Jersey law. Appellee's Brief at 21 (citations omitted). *See Printing Mart*, 563 A.2d at 40 (identifying the pivotal question as whether the defendant's conduct is "sanctioned by the rules of the game"). Armstrong does not cite to any New Jersey caselaw directly supporting its heightened standard of proof, however, and we have found none. Assuming, *arguendo*, that antitrust law requires such a standard, *cf. Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S.Ct. 2072, 2083 (1992) ("*Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision"), we are not persuaded that it should apply to a New Jersey tortious interference claim. Since the New Jersey courts examining this cause of action in a business context have not articulated a special burden of proof, we hesitate to do so.

Moreover, we do not find New Jersey's cause of action for tortious interference to be unduly hostile to procompetitive conduct in any event. Indeed, the admittedly "amorphus" element of "wrongful, unjustified conduct," is a

flexible standard "and must focus on a defendant's actions in the context of the case presented." *Printing Mart*, 563 A.2d at 40. This standard also includes directions to gauge the defendant's conduct against "the rules of the game." *Id.* As formulated, New Jersey's wrongful conduct element adequately takes into consideration procompetitive conduct.

We reject Armstrong's assertion that "it would be illogical to apply differing legal rules on permissible inferences for antitrust and tort claims where, as here, the *very same conduct* is challenged as both tortious interference and an antitrust violation." Although often applicable to a single dispute, tort and antitrust causes of action require widely divergent proofs. Moreover, these causes of action vindicate widely differing policies; the first is wholly personal to the plaintiff-competitor and the second requires the plaintiff to demonstrate harm to competition at large and antitrust injury. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 (1977). These divergent proofs and purposes readily account for any arguable differences in their standards of proof.

D. *TINS' Reasonable Expectation of Economic Advantage*

Although New Jersey law governs the tortious interference claim, the Connecticut Business Opportunity Investment Act, which requires registration and disclosure for certain kinds of business ventures, bears upon whether TINS could establish the first element of tortious interference: a reasonable expectation of economic advantage arising from TINS' agreement with Connecticut-based Stern. Because neither party challenges the ruling of the district court that New Jersey courts would look to the law of the situs of the contract in making that determination, we will examine the Connecticut Act to determine whether the agreement between TINS and Stern

could have created a reasonable expectation of business advantage.

The district court held that the Connecticut Act applied to TINS and that because TINS had not registered with Connecticut's Banking Commissioner nor made other efforts to comply with the Act, the TINS-Stern letter of intent was void as a matter of public policy. Therefore it would have been unenforceable by TINS and could not support a claim for tortious inference with that prospective contract against a third party. The plaintiffs claim that the district court erred when it applied the Connecticut Act to defeat, as a legal matter, TINS' reasonable expectation of economic benefit in the Stern-TINS letter of intent.[11] In this appeal TINS raises only two discrete arguments with respect to the application of the Act; therefore, we will only consider those two issues.

1. *The Connecticut Business Opportunity Investment Act*

The Connecticut Act, effective in 1979, was enacted to prevent misrepresentations and fraudulent practices in business opportunity investment sales. Brian J. Woolf, *Connecticut Business Opportunity Investment Act: An Overview of Its Regulatory Requirements and Its Interface with the Federal Trade Commission's Rule Entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity*

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[11] The plaintiffs also assert on appeal that the district court erred in resolving the issue of the application of the Connecticut Act because of the invited error doctrine involving Armstrong's proposed jury instructions. We find that because Armstrong had consistently contended that the Connecticut Act barred any claim for tortious interference, this legal issue was consistently preserved. Thus we decline to address the invited error doctrine in this instance. In any case, because the Connecticut Act issue is likely to arise during a new trial, we will address it now.

Ventures", 54 Conn. Bar J. 415 (1980) (hereinafter "*Overview*"). In enacting the statute, the Connecticut legislature sought to regulate "business opportunities" that may be peddled by "high pressure salesmen who flash in and out of motel rooms and are gone before an investor knows he's been fleeced," *id.* at 416 (quoting 12 *Continental Franchises Rev.* No. 10 at 1 and 2 (June 11, 1979)), by requiring "sellers" of "business opportunities" in Connecticut to register with the Connecticut Banking Commissioner and provide disclosure of specified information to prospective "purchasers-investors." A "business opportunity" is defined as:

> . . . the sale or lease, or offer for sale or lease of any products, equipment, supplies or services *which are sold or offered for sale to the purchaser-investor for the purpose of enabling the purchaser-investor to start a business*, and in which the seller represents . . . [C] that the seller guarantees, either conditionally or unconditionally, that the purchaser-investor will derive income from the business opportunity which exceeds the price paid for the business opportunity; . . . or [D] that upon payment by the purchaser-investor of a fee or sum of money which pursuant to the terms of the contract exceeds one hundred dollars to the seller, the seller will provide a sales program or marketing program which will enable the purchaser-investor to derive income from the business opportunity which exceeds the price paid for the business opportunity, . . . "Business opportunity" does not include the sale of

> an on-going business where the owner of that business sells and intends to sell only that one business opportunity; nor does it include the not for profit sale of sales demonstration equipment, materials or supplies, for a total price of five hundred dollars or less to any one person.

Conn. Gen. Stat. § 36-504(6) (emphasis added).

A seller who fails to register under the Act is prohibited from selling business opportunities within Connecticut.[12]

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[12] The Act specifically provides that:

> No person shall in connection with the sale or offer for sale of a business opportunity: (1) sell or offer for sale a business opportunity in this state or from this state unless it has first been registered with the Commissioner and declared effective by the Commissioner in accordance with the provisions of § 36-505; (2) represent that the business opportunity will provide income or earning potential of any kind unless the seller has documented data to substantiate the claims of income or earnings potential and discloses this data to the prospective purchaser-investor at the time such representations are made; . . . (5) make any claim or representation in advertising or promotional material, or in any oral sales presentation, solicitation or discussion between the seller and a prospective purchaser-investor, which is inconsistent with the information required to be disclosed by this chapter; (6) directly or indirectly (A) employ any device, scheme or artifice to defraud, (B) make any untrue statement of material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, or (C) engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

Conn. Gen. Stat. § 36-510.

The Act also affords prospective protection and retrospective avenues of relief for a purchaser-investor of a business opportunity. For example, at a specified time prior to the sale of a business opportunity, the seller must disclose specific information to the purchaser-investor including a financial statement. Conn. Gen. Stat. § 36-506. In addition the Act requires that the seller document any representations of potential profits. Woolf, *Overview*, *supra*, at 427. Retrospective avenues of relief afforded an injured purchaser-investor include both civil and criminal remedies. *Id.* at 429-30. Specifically, an injured purchaser-investor may sue for recovery of damages including attorneys' fees or may bring an action against a bond or trust account which is a prerequisite for registration for certain sellers. Conn. Gen. Stat. § 36-517(a), (b), (d).

If the seller has violated the Act by failing to disclose, to perform, or by making misrepresentations, the Act expressly makes voidable at the purchaser-investor's option any contract entered into by a seller:

> If a business opportunity seller . . . fails to give the proper disclosures in the manner required by § 36-506 . . . then within one year of the date of the contract, upon written notice to such business opportunity seller, *the purchaser-investor may void the contract* and shall be entitled to receive from such business opportunity seller all sums paid to such business opportunity seller.

Conn. Gen. Stat. § 36-517(a) (emphasis added).

2. *The Void-Voidable Distinction*

TINS contends that the Connecticut Act operates only to make voidable, at the purchaser-investor's option, a contract in violation of the Act's requirements. TINS argues that the district court improperly negated the distinction between void and voidable contracts under the Act in holding that the TINS-Stern letter of intent constituted a contract void as against

the public policy enshrined in the Connecticut Act. The district court acknowledged that the Connecticut Act gives the purchaser an option to void the contract with a seller who failed to comply with the Act's requirements. *Fineman*, 774 F. Supp. at 241. According to the district court, "the Connecticut Act specifically treats a contract voided at the option of the buyer as a void contract by eliminating all claims based thereon." *Id.* Thus it ruled that, lacking an *enforceable* economic expectation as a matter of law, TINS did not prove the requisite reasonable expectation of business advantage because Stern voided the letter of intent.

New Jersey law, which we apply to the claim of tortious interference, clearly provides that voidable contracts may still afford a basis for a tort action when the defendant interferes with their performance. *Harris v. Perl*, 197 A.2d 359, 363 (N.J. 1964). Given this rule, TINS' tortious interference claim against Armstrong is not defeated simply because Stern withdrew and voided the letter of intent. The facts of this case clearly demonstrate the wisdom of this rule; otherwise a third party could easily insulate itself from liability for its tortious acts.

The Connecticut Act implicitly distinguishes between voidable and void contracts. It eliminates all claims *of the seller*, rather than "all claims" as the district court inferred:

> No person who has made or engaged in the performance of any contract in violation of any provision of this chapter or any regulation or order adopted or issued under this chapter, or who has acquired any purported right under such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any cause of action on the contract.

Conn. Gen. Stat. § 36-517(h). While this provision might have precluded TINS from enforcing the letter of intent against Stern, it would not have precluded Stern from enforcing the letter of intent against TINS had Stern so wished. Supporting this

construction of the Connecticut Act is section 36-517(i), which is the sole provision declaring a contract void:

> Any condition, stipulation or provision binding any person acquiring any business opportunity to waive compliance with any provision of this chapter or any regulation or order adopted or issued under this chapter is void.

If the incipient contract was not void but merely voidable at Stern's option, then it would not be impossible, as a matter of law, to prove that TINS could have reasonably expected Stern to carry out the contract. Although there was evidence that Stern had independent reasons to cancel the agreement, TINS presented evidence from which a jury could disbelieve those reasons and conclude instead that Stern's cancellation of the TINS program resulted from Armstrong's pressure. Stern's power to avoid the contract without legal liability would be irrelevant to TINS' economic expectations if, as the jury might have concluded, Stern lacked any independent intention of backing out of its agreement with TINS.

As nothing in the Connecticut Act would have precluded Stern from enforcing the letter of intent against TINS, and TINS has proffered sufficient evidence, if believed by a jury, that Stern voided the contract as a result of Armstrong's tortious interference, the Connecticut Act may not be applied to defeat the element of TINS' reasonable expectation of business advantage. Because the Connecticut Act did not deprive TINS as a matter of law of all expectations of economic gain, the district court erred in holding that TINS failed to prove a reasonably expected economic benefit.[13]

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[13] Because application of the Connecticut Act does not preclude TINS' recovery, we need not address TINS' second contention, that the Act does not apply at all.

E. *Sufficiency of the Evidence of Tortious Interference*

The district court granted judgment notwithstanding the verdict on TINS' tortious interference claim, reasoning that the record lacked sufficient evidence of wrongful conduct by Armstrong and causation. While the plaintiffs' evidence is less than overwhelming, *see infra* at Part V.B., we do find that the plaintiffs have produced that minimum quantum of evidence necessary to withstand a motion for judgment n.o.v.

We apply a plenary scope of review to a judgment n.o.v. In so doing, we must be especially vigilant to keep foremost the question whether there is sufficient evidence of record to sustain the verdict of the jury. *Acosta*, 717 F.2d at 841-42. Reviewing the record in the light most favorable to the non-moving party, judgment n.o.v. may not stand "unless the record is 'critically deficient of that minimum quantum of evidence from which the jury might reasonably afford relief.'" *Link v. Mercedes-Benz of N. Am., Inc.*, 788 F.2d 918, 921 (3d Cir. 1986) (citations omitted); *see also Kinnel v. Mid-Atlantic Mausoleums, Inc.*, 850 F.2d 958, 961 (3d Cir. 1988). We must refrain from passing judgment on credibility issues; our task is to examine the record dispassionately for any evidence from which the jury may have rendered its verdict.

It is axiomatic that this scope of review requires that we draw all reasonable inferences in favor of the non-moving party, here the plaintiffs. Because the plaintiffs offer little direct evidence in this case, we are called upon to evaluate the reasonableness of inferences that may be drawn from circumstantial evidence. Adding to this already complex task, the plaintiffs seek to strengthen their largely circumstantial case with a theory that includes Armstrong's counsel in a conspiracy with Armstrong and Stern to cover-up their alleged wrongdoing.[14] The plaintiffs seek not only to discredit the

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[14] Among other attacks, plaintiffs' trial counsel -- no longer counsel before this court -- sought to attribute inconsistencies and alleged inconsistencies in defense witnesses' depositions and trial testimony to counsel's coaching; we note that he caused the court to interrupt the progression of the trial prior to Armstrong's summation by alerting securities analysts to the pendency of this lawsuit and the "probability of a multimillion

credibility of Armstrong's witnesses and the defense's theory of the case, but actually to substantiate their case by decimating the credibility of Armstrong's counsel. In light of this situation, we realize our obligation to ascertain at each step of the way whether the plaintiffs have offered sufficient "affirmative" and "concrete evidence" to defeat judgment n.o.v. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). "[D]iscredited testimony is not considered a sufficient basis for drawing a contrary conclusion." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 512 (1984); *see also Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879, 894 (3d Cir.), *cert. denied*, 454 U.S. 893 (1981).

At trial, TINS portrayed Stern as a financially vulnerable company that was highly dependent upon Armstrong, who supplied Stern with 100 percent of its resilient inventory, and whose products contributed 90 percent of Stern's total revenue. J.A. at 4359-60. *But see* J.A. at 3022 (60-70% of Stern's resilient business was comprised of Armstrong products; 80-85% of Stern's total business derived from Armstrong). It is undisputed that Stern had undergone substantial growth preceding its involvement with TINS and was suffering from undercapitalization. As a result, Armstrong's credit department in Lancaster had listed Stern as a "risk" account from March through November of 1984, J.A. at 7519-57, had placed a lien on Stern's inventory in November of 1983, J.A. at 7557; 7563-68, and requested of Abrahamson a personal guarantee on all materials ordered from March of 1984 onward. J.A. at 7559. It is undisputed that Abrahamson did not give this personal guarantee until sometime in 1985.

Against this backdrop, on May 24, 1984, Fineman approached Abrahamson to distribute the TINS magazine and suggested that Stern could make significant additional profit from the venture. Fineman promised Stern royalties of $29,000

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dollar plaintiffs' verdict" because he believed Armstrong and its lawyers had improperly failed to disclose this information.

in the first year[15] and profit on additional sales generated by the tag advertisements at about 10 to 15 percent of Stern's $11 million annual sales. J.A. at 2517. Fineman testified that Abrahamson acted enthused about the TINS magazine and interested in the possibility of hiring CFIPS to perform consulting work as well. After negotiations, Abrahamson paid one quarter of the $16,000 distributor fee established by TINS and signed the letter of intent.

Following this meeting, TINS' Director of Distributor Relations, Carolann Arena, furnished Stern with a "critical step list" outlining actions that Stern needed to take prior to and during the program "launch," the four to six week sales blitz by distributors' salesmen to their retail customers. Although Stern fulfilled some of those steps, for example by ordering video equipment from RCA on May 31, the plaintiffs alleged it failed to follow through on others. They note that Abrahamson had not arranged for a local production studio to film Stern's monthly tag nor had Stern's sales force made appointments to present TINS to their retailers prior to the sales training. This greatly concerned Arena, who testified that no other distributor had disregarded these steps, and consequently she telephoned Abrahamson on several occasions between the

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[15] This figure comports with Abrahamson's testimony that he expected to recoup the cost of the distributor fee of $16,000 within six months. J.A. at 4290. Although $29,000 was promised to Abrahamson, the record is cloudy as to how Fineman made the calculation. As will be detailed in some length in Part V.B. when we deal with the district court's grant of a new trial for the reason that the verdict was against the weight of the evidence, the record evidence casts doubt upon this rosy projection of $29,000. For example, charter distributors who had signed on before the settlement agreement received royalties of $8 per videotape sold. However, this royalty had been reduced to $5 by the time TINS was offered to Stern. J.A. at 2513. Fineman also testified that he estimated Stern would sell 200 subscriptions and Abrahamson more optimistically calculated 300. The $29,000 in promised royalties, however, appears to be rounded up from ($8/videotape) (12 months) (300 subscribers) = $28,800. J.A. at 2515. Fineman was not able to account for this discrepancy. Moreover, Fineman conceded that TINS distributors' salesmen had each averaged 11 subscriptions prior to the solicitation of Stern. Thus, given Stern's sales force of 13, a more reliable estimate of potential subscriptions might have been 143 rather than Fineman's 200, *see* J.A. at 2517, resulting in annual royalties of $8,580 or ($5) (12 months) (143 subscribers).

end of May and June 20th to discuss these "critical steps." J.A. at 8594-8601. Armstrong countered that Stern had complied with TINS' written instructions: 1) Stern salesmen planned to make appointments with their retailers on the Saturday, June 23, prior to the launch, and 2) because the critical step list specified that production studio arrangements were to be made *during* the launch, Abrahamson was not derelict in his responsibilities to TINS by Friday, June 22.

On June 5, 1984, Abrahamson and his three sales managers, Fischer, Owen and Cloud, traveled to TINS' Paramus, New Jersey headquarters for the shooting of their first TINS tag, which was to be placed at the end of the demonstration tape that Stern's salesmen would show potential retail subscribers during the sales launch. On their tag, the Stern people read scripted lines from a teleprompter that had been provided by TINS in which they portrayed Stern as an "exclusive" TINS distributor for their territory. *See* J.A. 7271-72. Fineman, Arena, and Gail Ferrar, vice president of TINS, all testified that the Stern group was shown the June 1984 edition of the TINS magazine during that visit and that they reacted positively to it. J.A. at 4296; 8677; 8593; 3512-14. To the contrary, Armstrong witnesses Abrahamson and Fischer testified that they viewed a TINS demonstration tape but deny having seen an actual edition of the TINS magazine at that time. J.A. at 4296; 5006. The trip was otherwise uneventful and the Stern group filmed its tag and returned to Connecticut.

A crucial event in the alleged conspiracy between Stern and Armstrong took place just two days later on June 7, 1984, when Abrahamson met with his Armstrong district managers for the resilient division, Robert Roth, and carpet division, Robert Guzinsky, to discuss ways in which to increase Stern's profitability. During that meeting, Abrahamson mentioned that Stern had signed up to distribute the TINS magazine. J.A. at 4300. Guzinsky, who had written a previous memorandum describing TINS, asked "What is it?" J.A. at 4055. Abrahamson described the TINS concept. Guzinsky remarked that it "sound[ed] like a good idea," and expressed interest in obtaining video equipment from RCA at the discounted price. J.A. at 4048; 4302. Roth's comment is reflected in the following exchange:

> Q: Did you say to him Alan, I don't think this makes a lot of sense in the Armstrong scheme of things, given the fact that we do have our own video program that can help you increase your profitability, that type of thing?
>
> [Roth]: That's probably what I said because we have an overlap program.

J.A. at 4085. Abrahamson then explained that TINS filled a void in the Armstrong program. All parties to the meeting agree that the discussion of TINS lasted no more than ten to fifteen minutes and Abrahamson did not recall any threat from Roth about Stern's participation. J.A. at 4301; 3052. TINS argues that Roth's comment violated the settlement agreement between TINS and Armstrong and supports a reasonable inference that Armstrong exercised improper influence and pressure upon Stern to withdraw from its agreement with TINS.

TINS also suggested that a scheduled golf date between Abrahamson and Roth provided another opportunity for Roth to discourage Abrahamson from following through with TINS. Abrahamson's calendar indicates that he had planned to play golf with Roth on the following day although both Abrahamson and Roth denied playing golf. J.A. at 4298; 4050.

On June 12, 1984, James Humphrey, Armstrong's general manager of sales and marketing for the floor division, issued the following memorandum to Armstrong's district managers, which was marked "confidential:"

> [W]e are not in a position to evaluate the effectiveness of the TINS program; however, we feel that since all Armstrong wholesalers are not involved in the program, it would be improper [for] Armstrong to participate in the system. Therefore, if any wholesalers request Armstrong's participation, either on a local level or a national basis, you should inform them that we are unable to offer

> any assistance. You should make sure that your representatives are not involved in any sales presentations on this system or any other program not provided by Armstrong.

J.A. at 7323. TINS posits that this memorandum violated the terms of the TINS-Armstrong settlement agreement and sent a negative message to Armstrong distributors regarding TINS.

The TINS training of the Stern sales force began on Wednesday afternoon, June 20, 1984 and continued, as scheduled, until Friday, June 22. Prior to commencement of the Wednesday session, TINS' representative, John Wolfe, requested that Abrahamson add to the sales commission, or "spiff," that TINS planned to offer Stern's sales force as an incentive to sign up more than five subscribers. J.A. at 4649. Abrahamson initially declined a proposal to contribute $20 toward a $50 spiff, which Wolfe testified was unusual, J.A. at 2273-75, but sensing his sales force's enthusiasm, Abrahamson softened and offered to pay $15 out of a $50 spiff to which Wolfe agreed. J.A. at 2355-58; 4307. According to Wolfe, Abrahamson explained to him that Stern was not receiving support from Armstrong. J.A. at 2277. The sales force was also shown a TINS "demo tape," with which the sales force was pleased. J.A. at 4652. That evening, Wolfe showed some examples of distributor tags to Abrahamson and the managers. J.A. at 4308.

The following day, on Thursday, June 21st, Wolfe designated most of the day for training the sales force to sell retailers on the TINS program. This pitch included teaching Stern's sales force scripted responses to overcome potential objections and concerns of solicited retailers. Wolfe characterized Thursday as a "typical, strong day." J.A. at 2278. Even by Abrahamson's account, the Stern sales force seemed "very positive." J.A. at 4309; *see also* J.A. at 4653-54. Following the session, at 6:00 p.m., Wolfe played the June 1984 edition of the TINS magazine for Stern's sales force. After the showing, Stern's resilient manager Fischer warned Wolfe that he could anticipate questions the next day concerning the quality of the TINS magazine. J.A. at 2366; 5011-12.

That evening, per TINS' standard operating procedure, Stern's sales force and managers had arranged to meet at a restaurant for dinner and then to retire to a motel in order to practice roleplaying for the next day's session. Abrahamson testified that he joined the group at the restaurant but departed after being asked to leave so that the sales force could candidly discuss TINS. J.A. at 4311; 5012.[16]

On Friday morning the sales training resumed, although Wolfe testified that Stern management no longer demonstrated involvement at that point. J.A. at 2279. The sales force raised concerns about the quality of the TINS magazine, but Wolfe characterized these as the usual sort of jitters, "maybe more apprehension than normal, but nothing earth-shattering." J.A. at 2280-81. Wolfe responded to each concern in accordance with the TINS script; the sales force appeared to be satisfied and to regain their enthusiasm. One salesman, Phil Parizeau, even opined that TINS had "tremendous value." J.A. at 2282-88.

One item outside the TINS script did arise that Friday morning, however, when Abrahamson demanded a non-negotiable, unconditional money back guarantee from TINS that Stern could offer to any unsatisfied retail customer. Wolfe and his assistant Paul Donofrio explained that they were not authorized to grant that request and, anxious to resume the seminar, Wolfe dodged the issue at that moment. J.A. at 5016-18. However, later, during the training seminar when the managers were not present, Wolfe represented to the sales force that if anyone had a problem with TINS, he could call Wolfe or Donofrio and either one would personally address those concerns and guarantee that customer's satisfaction -- "whatever it took." J.A. at 2287; 2381-82. Wolfe promised the sales force "satisfaction guaranteed" and "conditional money back," J.A. at

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[16] TINS suggests that "this restaurant story was simply concocted by Abrahamson both to reinforce his claim that the sales force opposed the program, and to distance himself from responsibility." Appellants' Brief at 16. A Stern employee, McGuire testified that he did not see Abrahamson at the restaurant at any time, J.A. at 5362, although there is evidence that the layout of the restaurant in several small rooms could account for this inconsistency.

2379-83, but he admitted that he made no such promise to Abrahamson directly. J.A. at 2385-86.

Late in the afternoon, after the sales force had met with Stern's management, Wolfe and Donofrio met with Stern's management for the last time. Abrahamson informed Wolfe, to his complete surprise, that TINS was "dead in the water" and Stern was withdrawing from the program. J.A. at 2293; 2385. Initially, Abrahamson provided two reasons: 1) lack of a money back guarantee and 2) his sales force's dissatisfaction with the program. J.A. at 4327. As Wolfe responded to each concern, Abrahamson voiced additional reasons. For example, Abrahamson explained that the sales force had been disappointed in the quality of the TINS magazine; Wolfe responded that one needed to evaluate the cumulative effect of a video medium. To address Abrahamson's concern that the program demanded too much managerial time, Wolfe responded that it would increase efficiency in the long run. J.A. at 2297-99. Abrahamson continued with a host of reasons until Wolfe despaired of winning him over. After approximately two hours, the meeting ended and Wolfe and Donofrio returned to New Jersey.

The following day, Fineman telephoned Abrahamson at his home and entreated him to reconsider his decision and even tried to entice Abrahamson with free CFIPS services to sweeten the deal. Abrahamson remained adamant and Fineman testified that Abrahamson indicated during their conversation that certain specials would not be made available to Stern by Armstrong. J.A. at 1908; 1911.

Viewing this evidence in the light most favorable to the plaintiffs, we conclude that TINS produced that minimum quantum of evidence required to sustain the jury's verdict. From the evidence produced at trial, the jury could draw an inference that Armstrong disapproved of its distributors engaging in selling the TINS magazine because it was several years behind in developing an "overlap" program and did not relish future competition for its video network. The jury could also have inferred that Stern's financial fragility led Abrahamson to perceive a threat in Roth's remarks about TINS as an "overlap" program and that Stern's financial dependence on Armstrong

made Stern particularly susceptible to coercion. The jury may have inferred that Abrahamson's enthusiasm for TINS cooled after the June 7th meeting with Roth, as evidenced by Abrahamson's failure to procure a local production studio and the sales force's failure to make appointments with retail customers in advance of their training seminar. Given these inferences, the jury may also have disbelieved Armstrong's voluminous evidence that Stern's enthusiasm was chilled after viewing the June edition of TINS on Thursday evening and instead credited the plaintiffs' testimony that Stern management had viewed and enjoyed that edition of the TINS magazine on June 5th. Thus, the jury could have disbelieved that Abrahamson put the matter to a vote and followed the consensus, choosing rather to infer that Abrahamson simply trumped up a number of excuses and attempted to distance himself from responsibility for the decision.

F. *Fineman's Individual Tort Claim*

We must next address whether Fineman may maintain an individual claim for tortious interference under the theory that Armstrong's alleged destruction of TINS damaged beyond repair Fineman's reputation as a floor covering industry consultant. The district court granted judgment n.o.v. on this claim, reasoning first, that it suffered derivatively from the same insufficiency of the evidence as TINS' tortious interference claim and alternatively, that Fineman had failed to prove "either directly or by permissible inference, that Armstrong specifically intended to injure Fineman in his individual capacity when it allegedly interfered with the Stern/TINS relationship." *Fineman*, 774 F. Supp. at 250.

Assuming for purposes of this discussion that Fineman has produced, as he claims, sufficient evidence upon which to find that Armstrong specifically intended to drive Fineman out of the consulting business, *see* Restatement (Second) of Torts §766, comment p (requiring specific intent to injure a third-party plaintiff); *Printing Mart*, 563 A.2d at 37 (noting substantial similarity between the Restatement's and New Jersey's formulation of the tort), we conclude as a matter of law that Fineman has failed to prove an additional element of tortious interference with a prospective contractual relation,

namely, a sufficiently concrete prospective contractual relation.

Printing Mart, a case in which the New Jersey Supreme Court carefully delineated the elements of a tortious interference claim, makes clear that a plaintiff must establish injury to a prospective economic relation from the defendant's tortious interference. 563 A.2d at 38-39.[17] Even accounting for the distinction between that case and this -- in *Printing Mart*, the plaintiffs were parties to the contract (i.e., in TINS' position rather than Fineman's) -- we conclude that a third party to the contract must also establish with reasonable certainty a prospective economic relation in order to state a claim for tortious interference under New Jersey law. This Fineman has failed to do.

"Prospective economic relation" is broadly defined under New Jersey law:

> The expression, prospective contractual relation, is not used in this Section in a strict, technical sense. It is not necessary that the prospective relation be expected to be reduced to a formal, binding contract. It may include prospective quasi-contractual or other restitutionary rights or even the voluntary conferring of commercial benefits in recognition of a moral obligation.
>
> * * * * *
>
> Included are interferences with the prospect of obtaining employment or employees, the opportunity of selling or buying land or chattels or services, and

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[17] The parties have not suggested, nor have we been able to find, any New Jersey cases addressing a claim for tortious interference brought by a plaintiff who was not a party to the contract. Assuming without deciding that New Jersey would permit such a claim, we must determine whether this record supports Fineman's individual claim.

> any other relations leading to potentially profitable contracts.

Printing Mart, 563 A.2d at 39 (quoting the Restatement (Second) of Torts §766B, comment c). Arguably, the relevant prospective economic relation would be Stern's letter of intent with TINS. However, Fineman's individual claim rests upon losses sustained in his consulting business. Because his individual claim is premised upon injury to future consulting, it is equally appropriate to require Fineman to prove sufficient prospects for consulting contracts after the summer of 1984 when Armstrong allegedly coerced Stern into voiding its letter of intent with TINS.

The record is critically deficient with respect to Fineman's future consulting prospects. Although the record was replete with evidence of Fineman's fine reputation as an industry consultant, it was devoid of objective evidence that Fineman had any concrete plans for future consulting work. Fineman's consulting was conducted solely under the aegis of the CFIPS organization and on this record we are unable to find evidence of CFIPS's future consulting prospects. CFIPS disbanded shortly after TINS came to life, in part due to the departure of one of its primary consultants, Ron Friedman, which was unrelated to this litigation, and the fact that the rest of the CFIPS staff, including Fineman, Ferrar and Arena, redirected their attention to TINS exclusively. J.A. at 8814-15. By Fineman's own admission, CFIPS did not acquire any new clients after 1983, J.A. at 2614, nor did it sell consulting services to any clients in 1984. J.A. at 2993. Fineman's hope that TINS' eventual success would drum up later business for CFIPS amounts to speculation given the lapse of the CFIPS consulting business in 1984.

Because Fineman has failed to demonstrate a reasonable prospect of future consulting business in the floor covering industry, his individual claim for tortious interference with contract fails as a matter of law.

G. *Punitive Damages*

We turn finally to address whether the district court properly granted judgment n.o.v. on the jury's award of punitive damages. We note that since we are affirming the judgment n.o.v. on Fineman's *individual* tortious interference claim, the judgment n.o.v. on his punitive damages follows suit. Nonetheless, with respect to TINS, this issue may arise upon retrial, so we will address its merits. The parties specifically dispute whether Armstrong's conduct rises to that level of misconduct subject to punitive damages. Although the jury awarded punitive damages in the amount of $200 million, the district court found as a matter of law that the record is "critically devoid of that quantum of evidence as to the wrongfulness of the alleged conduct under the legal standard governing such awards." *Fineman*, 774 F. Supp. at 254.

Under New Jersey law, punitive damages "can be awarded to punish [a defendant']s aggravated misconduct" and to deter similar misconduct in the future. *Nappe v. Anschelewitz, Barr, Ansell & Bonello*, 477 A.2d 1224, 1230 (N.J. 1984) (citations omitted). The New Jersey Supreme Court has made clear that punitive damages may only be awarded where the wrongful conduct underlying tort liability exceeds the minimum threshold for a finding of liability. *Berg v. Reaction Motors Div.*, 181 A.2d 487 (N.J. 1962). There the court articulated that the commission of a tort will not alone justify the imposition of punitive damages regardless of whether the tort be grounded on strict liability or fault. *Id.* at 496. As explained in *Berg*, which involved a nuisance:

> Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that his conduct may be called wilful or wanton. Lacking this element,

> mere negligence, however 'gross,' is generally held not to be enough.

Id. (citing Prosser, Torts, 9-10 (2d ed. 1955)). The prerequisite misconduct "may be satisfied upon a showing that there has been a deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to consequences." *Id.*

When assessing punitives attending an intentional, rather than a negligent tort, the New Jersey Supreme Court has termed the prerequisite misconduct as "actual malice," defined as "nothing more or less than intentional wrongdoing -- an evil-minded act . . . ." *Belinski v. Goodman*, 354 A.2d 92, 94 (N.J. Super. 1976) (citation omitted). In *Belinski*, which involved a claim of tortious interference with a brokerage agreement, the court concluded that evidence demonstrating the defendant's "low moral fibre" and motivation to commit the tort were relevant to the defendant's degree of actual malice. *Id.* at 95; *see also Di Giovanni v. Pessel*, 260 A.2d 510, 512 (N.J. 1970) (the defendant-doctor's failure to sign a certificate for confinement before a notary resulting in false imprisonment of the plaintiff lacked not only the prerequisite actual malice but failed even to equal wanton and reckless disregard).

The parties focus upon whether the evidence of Armstrong's wrongful interference with the TINS-Stern agreement alone suffices to prove the prerequisite misconduct for punitive damages. TINS contends that the legal malice necessary for proof of liability satisfies the actual malice prerequisite for punitive damages; understandably, Armstrong differentiates between the two. We cannot discern a clear rule under New Jersey law on this point. Indeed, it appears to be an unanswered question. *See Nappe*, 477 A.2d at 1237 n.3 (O'Hern, J., concurring) ("The majority says 'it is especially fitting to allow punitive damage [sic] for actions as legal fraud, since intent rather than mere negligence is the requisite state of mind'" (citation omitted) . . . "whether the threshold for punitive damages should be identical to that for compensatory damages is exactly the type of question we should resolve and not leave to the discretion of juries").

Nevertheless, if TINS' theory is believed by the jury, then we conclude that TINS would be entitled to a jury charge on punitive damages upon retrial. Giving TINS the full benefit of every possible inference, the record supports a finding of actual malice in excess of the legal malice necessary for tortious interference. Because we need not, upon this factual record, reach the legal question unanswered by the New Jersey Supreme Court, we decline to predict whether New Jersey would rule that as a matter of law, the wrongful and intentional conduct necessary for tortious interference would, as a matter of law, entitle a plaintiff to punitive damages.

Taken in the light most favorable to TINS, the evidence suggests sufficient actual malice or "an evil-minded act." Aware of TINS' precarious financial position from Fineman's disclosure during the 1983 settlement negotiations, Armstrong recognized its opportunity to disrupt TINS' recovering, or to eliminate TINS entirely by destroying TINS' agreement with Stern. Armstrong accomplished this by wielding both the general authority it exercised over its captive distributors and by applying more specific coercive pressure, available because of Stern's precarious financial position. Actual malice is especially present here because of the history of this dispute; the jury could have found that despite a settlement agreement, Armstrong flagrantly disregarded its continuing obligations under the settlement agreement and deliberately reactivated its plan to clear out any competition for its future video network plans. Giving TINS the benefit of every possible inference, a jury could find that the record demonstrates that Armstrong harbored sufficient actual malice to award punitive damages. Thus we hold that the district court erred in granting judgment n.o.v. on TINS' punitive damage award.

IV. Sherman Act Section 2

A. *Elements of a Leveraging Claim*

Section 2 of the Sherman Act makes it unlawful for "[e]very person [to] monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States . . ." 15 U.S.C.A. § 2 (West Supp. 1992). This case presents

both monopoly and attempted monopoly claims under section 2. We are called upon to evaluate whether the district court properly granted judgment n.o.v. for Armstrong on TINS' Sherman Act section 2 claims that Armstrong employed monopoly power in the resilient product market to "perpetuat[e] said monopoly and for the purpose and with the effect of attempting to monopolize the relevant [resilient and video magazine] markets . . . ." Compl. at ¶¶ 31, 32.

To prove a monopoly claim under section 2, TINS must show: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). To succeed on its claim of attempted monopoly, TINS must show that Armstrong possessed both specific intent to monopolize the video market and sufficient market power to create a dangerous probability of success. *Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068, 1079 (3d Cir. 1978); *see also American Tobacco Co. v. United States*, 328 U.S. 781, 785 (1946).

TINS premised both of its section 2 claims upon a leveraging theory, alleging that Armstrong employed monopoly power in the alleged resilient product market to gain a monopoly, or a dangerous probability of a monopoly, in the relevant video product market. Prior to submission of the case to the jury, TINS sought to alter its case theory to obviate its need to prove a resilient monopoly power lever, by challenging the district court's ruling that the section 2 claim requires proof of "the alleged relevant market or sub-market for resilient floor covering alone" and second, "proof that in 1984 Armstrong possessed monopoly power in such alleged resilient market or sub-market." J.A. at 650-51.

Our review of a district court's ruling on points for charge is conducted under an abuse of discretion standard. *Bennis v. Gable*, 823 F.2d 723, 727 (3d Cir. 1987). In this instance, the district court did not abuse its discretion in declining to permit a dramatic change in TINS's theory of the case at the end of trial. As the district court accurately noted,

(Armstrong) *intended* to affect Fineman's contractual relations with others, i.e. his consulting clients.

Comment h to s 767, to which comment p above refers, provides in relevant part as follows:

> *h. Proximity or remoteness of actor's conduct to interference.*
>
> If, however, A induces B to sell certain goods to him and thereby causes him not to perform his contract to supply the goods to C, this may also have the effect of preventing C from performing his contractual obligations to supply them to D and E. C's failure to perform his contracts is a much more indirect and remote consequence of A's conduct than B's breach of his contract with C, even assuming that A was aware of all of the contractual obligations and the interference can be called intentional. This remoteness conduces toward a finding that the interference was not improper. The weight of this factor, however, may be controverted by the factor of motive if it was the actor's primary purpose to interfere with C's obligation to D and E, or perhaps by the factor of the actor's conduct if that conduct was inherently unlawful or independently tortious. Similar results follow in cases in which the person whose contract was the subject of the initial interference has contracts of his own with his employees, his subcontractors or

his suppliers,' which he is now unable to perform.

In *Glass Bottle Blowers Ass'n v. National Bottle Co.*, 584 F. Supp. 970 (E.D. Pa. 1983), plaintiff union filed an action under Pennsylvania law[21] against National Bottle, the employer of its members, asserting several claims. Plaintiff also asserted a claim for tortious interference with contract against First Pennsylvania Bank, claiming that the Bank's actions as a creditor caused National to be unable to perform under the collective bargaining agreements. The Court dismissed the complaint as to First Pennsylvania, and then various of the other defendants filed a third party complaint against First Pennsylvania asserting a tortious interference claim. These other defendants asserted that if they were found liable for National Bottle's acts, then they would be entitled to recover from First Pennsylvania for tortious interference.

The court dismissed this complaint because, as a matter of law, the allegations did not support the claim. Specifically, the only one who could recover under tortious interference with contract was the Union, not these defendants/third-party plaintiffs, since they were not parties to the contract interfered with. (584 F. Supp. at 972 (quoting *Restatement (Second) Torts* § 766 and Comment p)).

Norwood Easthill Associates v. N.E. Watch., 222 N.J. Super. 378 (App. Div. 1988) is a recent case exploring New Jersey's rules concerning tortious interference with contract. While it does not address the precise issue at hand, it is useful for its summary of the necessary elements of the cause of action. Plaintiff was a partnership which entered into a *252 contract with the Borough of Norwood for the purchase of land the plaintiff wanted to develop. Later, the zoning ordinance was declared invalid, and so plaintiff and the Borough entered into a settlement agreement. During a public meeting to explain the settlement, defendants (a non-profit group of residents opposing the development) made several threats against the Borough, its

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[21] Pennsylvania and New Jersey both follow the *Restatement (Second) of Torts*.

attorney and the mayor. Thereafter, a court denied approval of the settlement agreement, it was revised, and then finally approved.

Plaintiff brought an action against the defendants for malicious interference with the settlement agreement. The trial court had granted summary judgment to the defendants for several reasons, including the fact that the threats were made against the Borough, not the plaintiff. The Appellate Division disagreed, saying that "[i]f defendants ... sought to affect adversely an agreement *to which plaintiff was a party*, and if such action directly affected plaintiff's rights under that agreement, plaintiff might maintain an action for malicious interference." (222 N.J. Super. at 383) (emphasis added).

Organization of Minority Vendors, Inc. v. Illinois Central Gulf Railroad, 579 F. Supp. 574 (E.D.Ill. 1983), is not a New Jersey case, but does depend on the *Restatement (Second) Torts* and its comments. Plaintiffs were a non-profit organization of minority vendors and black or Hispanic owned businesses. Defendants were several railroads who solicit bids and award contracts for supplies and services. Also named as defendants were several white male owned or controlled vendors who supplied goods and services to the railroads. Plaintiffs asserted numerous causes of action, including a claim for tortious interference with contract. (*Id.* at 605). The Court determined that this count asserted two discrete causes of action. The first was that the white vendors interfered with government funding contracts between the railroads and the federal government by inducing the railroads to breach the affirmative action portions of those contracts. (*Id.*) The second was a claim that the white vendors tortiously interfered with the prospective business opportunities of the minority businesses by causing the railroads to fail to fulfill the affirmative action requirement. (*Id.*)

The court dismissed the first cause of action because "[i]mplicit in this definition [of tortious interference] is the requirement that the plaintiff be a party to the contract." (*Id.*, citing *Restatement (Second) Torts*, § 766 and comment p). In so doing, the court rejected the argument that the plaintiffs were third-party beneficiaries of the funding contracts and

targets of the white vendors' wrongful acts. (*Id.*) "By focusing on the motive and purpose of the wrongdoer rather than rights under the contract courts in a few jurisdictions have suggested that non-parties to a contract singled out for harm by the defendant can sue for the injuries suffered as a result of the defendant's tortious interference with a contract." (*Id.*, citing *DeVoto v. Pacific Fidelity Life Insurance Co.*, 618 F.2d 1340 (9th Cir.), *cert. denied*, 449 U.S. 869 (1980)). The court rejected this view because "[a]ll the relevant precedent suggests that only direct parties to a contract, and not third-party beneficiaries, can maintain a tortious interference action." (*Id.*)

The *Minority Vendors* court did, however, allow the second tortious interference claim to remain. Unlike the first, this action was for injuries caused by interference with the relationship between the minority owners and the railroads. Accordingly, it did not suffer from the same defect as the first cause of action.

The *DeVoto* case cited by the *Minority Vendors* court was an antitrust and tortious interference case. Pacific Fidelity Life Insurance and American Home Assurance Company both sold mortgage protection insurance to mortgagors. (618 F.2d at 1343). Bankers Mortgage Company was in the business of making real estate loans, and was a sister subsidiary of Pacific. Bankers and American had an agreement by which Bankers provided American with a list of the names of mortgagors for a fee and a commission for each policy sold. Pacific persuaded Bankers to end the agreement in order to provide names to it. The suit was brought by two individuals who were responsible for bringing American and Bankers together and who expected to receive agents' commissions on the contract. (*Id.*)

In addition to an antitrust claim, the plaintiffs alleged that the commissions from the Bankers-American agreement were a business advantage lost as a result of Pacific's inducing Bankers to repudiate the contract. (*Id.* at 1346). The Ninth Circuit reversed a jury verdict in favor of the plaintiffs because there was no evidence that Pacific had any motive or purpose to injure these individuals. (*Id.* at 1347). Thus, the question on which the court focused was the requirement of

specific intent to harm the plaintiff. Contrary to the *Minority Vendors* court's reading, the *DeVoto* court did not consider the question of whether a nonparty could seek damages for interference with contract. In fact, the *DeVoto* case can be read to show that a cause of action for the loss of business advantage between plaintiffs and American was valid. (*See id.* at 1347). If so, it appears to be consistent with *Minority Vendors*. As noted above, the Restatement requires at least one of the two elements: specific intent or the status of a party to the contract.

Based on the Restatement and the above cases, it appears that Fineman can collect for the tortious interference allegedly committed by Armstrong only if he has proven that the defendant specifically intended to harm him by interfering with the Sterns-TINS business relationship, since Fineman was not a party to that relationship. Indeed, this Court so instructed the jury based on such precedent. (*See* Jury instructions at 43).[22] In other words, the question is not merely one of foreseeability[23] as the plaintiffs continue to argue. This Court also rejects the defendant's claim that only parties to a contract may sue for its interference. (*See* Defendant's J.N.O.V. Br. at 61- 63). Similarly, this Court does not adopt defendant's argument to limit the claim only to interference with any consulting contract between Fineman and Stern. (*Id.* at 64).

There is sufficient proof in the record for a reasonable jury to conclude that Armstrong knew of Fineman's consulting business. The jury could also reasonably conclude that Armstrong knew about and disliked Fineman's advice to distributors to maintain smaller inventories. Indeed, the jury could even reasonably conclude that Armstrong would foresee that destruction of TINS would harm Fineman's reputation in the industry. The evidence does not, however, either directly or by

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[22] The question of whether Fineman could recover on this claim arose during the course of trial. Accordingly, this Court conducted its own research on the question and eventually requested briefs from the parties. Review of all such information led this Court to the conclusion reiterated here and the jury was instructed accordingly.

[23] Foreseeability is a concept germane to the issue of proximate cause but not determinative of the element of intent to harm.

permissible inference, show any intent on the part of Armstrong to either "get rid of" or otherwise harm Fineman as a consultant.

All of the evidence upon which plaintiffs rely in support of their tortious interference claims refers only to TINS' efforts in the development of its video magazine, and Armstrong's alleged efforts to thwart TINS' business efforts, as described above. The record is completely devoid of any proof that Armstrong acted with the express (or even implied) purpose of eliminating Fineman's consulting opportunities. Armstrong is therefore entitled to J.N.O.V. as to Fineman's individual claim.

This is further supported by the fact that Fineman never conducted consulting in his own name. Rather, his consulting business was conducted in the form of another corporation, CFIPS, which employed others as consultants besides himself. As with Fineman, the record is completely devoid of any intent to harm CFIPS. Thus, even if this Court determined that Fineman was the "alter-ego" of CFIPS (which it does not, and cannot on this record), there is no evidence of a specific intent to harm that corporation.

E. *Punitive Damage Award*

This Court determines that even if the plaintiffs' claim for tortious interference survived the motion for J.N.O.V., the punitive damage award cannot. The record is critically devoid of that quantum of evidence as to the wrongfulness of the alleged conduct under the legal standard governing such awards.

To obtain punitive damages under New Jersey law the plaintiff must prove either "(1) actual malice, which is nothing less than intentional wrongdoing -- an evil minded act; or (2) an act accompanied by a wanton and willful disregard of the rights of another. Clearly, each case must be governed by

its own particular facts."[24] *Berg v. Reaction Motors Division*, 37 N.J. 396, 414 (1962) (quoting *LaBruno v. Lawrence*, 64 N.J. Super. 570, 575 (App. Div. 1960), *certif. denied*, 34 N.J. 323 (1961)); *see also Nappe v. Anschelewitz et al.*, 97 N.J. 37, 50-51 (1984) (same); Jury instructions at 46. The "wanton and willful" requirement is satisfied upon a showing that there was a deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to the consequences. *Berg*, 37 N.J. at 414. That is, even the second showing requires proof of a "positive element of conscious wrongdoing." (*Id.*)

These standards, however articulated, demonstrate the realization that "only conduct which is particularly egregious will justify an award of punitive damages." *Fischer v. Johns-Mansville Corp.*, 103 N.J. 643, 654-55 (1986). *See also Leimgruber v. Claridge Assoc., Ltd.*, 73 N.J. 450, 454 (1977) ("Punitive or exemplary damages are sums ... assessed when the wrongdoer's conduct is especially egregious." (citations omitted)). In other words, "something more than the mere commission of a tort is always required for punitive damages." *DiGiovanni v. Pessel*, 55 N.J. 188, 190 (1970) (quoting W. Prosser, *Torts*, § 2 at 9-10 (2d ed. 1955)). Indeed, "mere negligence, however 'gross', is generally held not to be enough." *Berg*, 37 N.J. at 413, 181 A.2d 487 (quoting Prosser, *Torts*, § 369 at 9-10 (2d ed. 1955)).

Generally, punitive damages may be awarded only "[w]here the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime." *Security Alum. Window Mfg. Corp. v. Lehman Assoc. Inc.*, 108 N.J. Super. 137, 142 (App. Div. 1970) (citing Prosser, *Torts* (3d ed. 1964), § 2, at 9)). *See also Restatement (Second) Torts* § 908, comment b) (same).

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[24] In this portion of the present opinion, when the Court employs the term "malice" in its discussion of whether TINS has proven its punitive damages claim, it does so as an abbreviated reference to either (or both) of the two punitive damages standards stated here.

The proof presented by TINS in support of its claim for punitive damages fails to meet any of these standards. Indeed, none of the evidence provides even a remote basis for a finding that any act of Armstrong was sufficiently malicious, wanton or egregious to warrant an award of punitive damages in any amount.[25]

For example, the plaintiff relies heavily on a memo written by Armstrong's Csrnko on October 20, 1983, particularly on the following paragraph:

> [W]e feel this program conflicts with the future video plans and certainly would not prove to be in our combined best interests.
>
> ... *[I]f you receive any inquiries regarding "TINS", please try to discourage your wholesalers participation* and offer suggestions on how their time could be directed towards a more important Armstrong sales effort. Additionally, please notify me as soon as the offer has been made to your wholesaler. I want to make sure we all stay on top of this competitive effort.

(Px. 5120) (emphasis supplied as provided by the plaintiff, at Plaintiffs' J.N.O.V. Opp. at 16-17). The language of the memo itself refutes an inference of malice of any sort, and certainly does not indicate malice sufficient to warrant imposition of punitive damages. Furthermore, when the entire context of the memo is viewed, it is even clearer that no malicious intent or other outrageous conduct can be derived therefrom:

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[25] The following analysis shows that the plaintiffs are not entitled to any amount of punitive damages. It is, therefore, not necessary for the Court at this point to discuss the separate issue of the amount of punitive damages ($200 million) awarded.

> We obviously feel the "TINS" program will require a considerable amount of selling time on the part of wholesaler salesmen, which could be better utilized selling Crowne Corlon, Glazecraft, Medintech and other Armstrong resilient flooring products.

(Px. 5120). At most, the jury could reasonably find that Armstrong sales personnel were to discourage wholesalers from becoming TINS distributors in order to devote more time to the sale of Armstrong products. The plaintiffs' argument that this memo is evidence of malice is but an invitation to speculation and conjecture.

The plaintiffs have also placed considerable emphasis (aided by emotional rhetoric) on Humphrey's memo of September 12, 1983. (Px. 165). This mildly worded memo, like that of Csrnko, merely suggests that Armstrong retailers be encouraged to use Armstrong's videos rather than TINS'. It is unreasonable, even ludicrous, to suggest that this memo orders Armstrong employees to act maliciously with respect to TINS, as is evident on its face. The language of this memo, as Csrnko's, is couched in terms of a request rather than a mandatory edict. Again, plaintiffs' reliance, in an impassioned plea to the jury, on one phrase taken out of context cannot support an inference that Armstrong acted with malice in urging its wholesalers to concentrate on sales of its products rather than the TINS program.

Similarly unavailing to the plaintiffs' position is the reliance on the Guzinsky memo of September 27, 1983. (Px. 216A). This memo also refers to the fact that Armstrong distributors' time is better spent selling Armstrong products, and states that "we feel [the TINS] program conflicts with our mutual video plans and would not prove to be in our mutual best interest." (*Id.*) Once again, the language of the memo as a whole, rather than emphasis on a single portion, renders improbable and unreasonable any inference of malice.

It is also significant that these memos were written prior to the Settlement Agreement between Armstrong and TINS. The Settlement Agreement extinguished all claims of the plaintiff for wrongdoing allegedly occurring prior to January 12, 1984. Also the passage of time, plus the intervening events in 1984 diminished their weight considerably; no reasonable jury could determine otherwise. Admittedly, evidence from 1983 was allowed by this Court on the basis that it is somewhat probative on the question of Armstrong's intent in 1984, the period of the alleged tortious interference. However, what the plaintiffs fail to recognize is that the memos, when read in their entirety and not through excerpts extracted out of context, simply do not under any reasoned construction amount to evidence of either actual malice or a wanton and willful disregard of TINS' "rights." It is unreasonable to infer from this evidence, as the plaintiff so emotionally begged the jury to do, that Armstrong deliberately and with malice coerced its wholesalers into refraining from participating in the TINS program.

Plaintiffs' reliance on evidence arising after the Settlement Agreement is similarly unavailing. For example, plaintiffs place considerable weight upon evidence concerning the meeting between Roth and Abrahamson on June 7, 1984. *See* the Court's extensive discussion of this meeting at 44-48, *supra*. The plaintiffs are clearly stretching the bounds of reason by suggesting that Roth's brief remark, in the course of a three-hour conference, supports a finding that Armstrong acted with malice. First, the language of the comment itself does not contain a threat, nor any intent of interfering with Stern's decision to become a TINS distributor. Any inference that it does could only be the product of fantasy and speculation. Second, the statement does not constitute a breach of the Settlement Agreement as the plaintiffs have continuously suggested. This Court determined as a matter of law that "Paragraph 4 of the [Settlement] agreement does not place any continuing duty on Armstrong to instruct its representatives not to discuss the TINS program with Armstrong wholesalers." (Summary Judgment Op. at 52). Roth's comment does demonstrate, as a reasonable jury could find, disregard for the edict issued in January, 1984 by Armstrong's headquarters that all requests concerning Armstrong's view of TINS be referred

to Lancaster. Even so, particularly considering the context in which the statement was made, Roth's comment is insufficient to support an inference of conduct so egregious as to warrant an assessment of punitive damages.

The plaintiffs also place considerable emphasis on the fact that the Humphrey memo was issued on June 12, 1984, only 8 days before TINS began its sales program and 10 days before Stern backed out of the deal. It is well-settled, however, that the fact of one event following another does not support an inference of causation. " 'Inferred factual conclusions based on circumstantial evidence are permitted only when, and to the extent that, human experience indicates a probability that certain consequences can and do flow from the basic circumstantial facts. ... [A]ssuming a causal connection between two events merely because one follows the other' is insufficient." *American Bearing Company, Inc. v. Litton Industries*, 729 F.2d 943, 952 (3d Cir.), *cert. denied*, 469 (1984) (quoting *Edward J. Sweeney & Sons v. Texaco*, 637 F.2d 105, 116 (3d Cir.1980), *cert. denied* 451 U.S. 911 (1981)). As noted earlier in this opinion, Humphrey's memo had a limited circulation, and the record is devoid of evidence that its contents were ever conveyed to Stern.

Plaintiff's assertion that the June 12, 1984 Humphrey memo allows a reasonable inference that Armstrong acted with malice is misguided as well. The language upon which plaintiff relies is the statement that "if any wholesalers request Armstrong's participation, either on a local level or a national basis, you should inform them that we are unable to offer any assistance." (Px. 525). Plaintiffs argue that this language constitutes a threat to revoke any and all promotions from any wholesalers who become involved in TINS. Thus, plaintiffs rely on this language as proof of Armstrong's malicious intent to ruin TINS. However, consideration of this language in the context in which it was written refutes any possible inference of malice or wanton misconduct. The language of the memo itself, as a whole, clearly illustrates that the only reasonable inference is that Armstrong was not willing to provide "assistance" in the form of special, additional promotions only to those Armstrong distributors who were also TINS' distributors. *See* this opinion, *supra*, at 48-54. Once

again, plaintiffs' impassioned over-reliance upon language taken out of context is to no avail. No reasonable juror could review this memo and conclude that Armstrong bore any malicious or wanton intent to destroy TINS.

Contrary to plaintiffs' arguments, this Court's summary judgment opinion does not require a different result. In fact, the portion of the Opinion to which plaintiffs refer, page 22, is merely a recitation of the plaintiffs' argument made at the time. It does not reflect this Court's opinion as to the interpretation which should be given to such language. Even if it had, the interpretation suggested by plaintiffs there and here has not been supported by the evidence adduced at trial, and therefore is utterly without foundation.

Furthermore, it is irrefutable that Armstrong had no obligation, whether under the Settlement Agreement or under the law, to provide resources to its wholesalers for use in promoting the TINS magazine. Indeed, it is entirely reasonable and legitimate for Armstrong to require that resources it provides to wholesalers be used only to promote Armstrong products. It is beyond refute that a desire to promote one's own business, standing alone, negates the requisite state of mind required for a finding of maliciousness or wanton misconduct necessary to support an award of punitive damages. *See e.g. Buono Sales, Inc. v. Chrysler Motor Corp.*, 449 F.2d 715, 723 (3d Cir. 1971). It belies common sense and reason to expect one business to actively aid a business which competes, in the sense that TINS' magazine contains advertisements for products manufactured by Armstrong's competitors in the floor covering industry. Accordingly, an inference to the contrary, that is an inference that, from refusal to aid, Armstrong was motivated by a malicious intent to harm TINS, is unreasonable.

This conclusion is further buttressed by the fact that the plaintiffs were fully aware of Armstrong's view that it would not and could not provide favors for those of its distributors who participated in the TINS program. The letter from Draeger to Fineman, attached to the Settlement Agreement, specifically states that "Armstrong cannot, as a matter of policy, recommend a preference for any product which is neither

manufactured nor marketed by Armstrong." (Exh. C to Px. 6001).

The existence of notations of "confidential" related to the June 12, 1984 memo, the Roth-Abrahamson meeting, and Armstrong-distributor agreements does not support a finding of malice either. As noted in section II.C of this opinion, *supra* at 54-56, the term "confidential" arises in three completely unrelated instances and contexts, and therefore adds nothing to the plaintiffs' case. The meeting between Roth and Abrahamson was necessarily "confidential" in light of the broad range of subjects covered by such meeting, most particularly, Stern's financial condition. Similarly, the confidentiality term in distributor arrangements is not rationally linked in any manner to Armstrong's view of TINS or any actions taken with respect to Stern's arrangement with TINS. (*See e.g.* Px. 1244 (Distributorship Agreement between Armstrong and Nelson & Small), at ¶ 11). It is clearly designed to protect sensitive, proprietary Armstrong information to which distributors may become privy. Finally, the notation of "confidential" on the June 12 memo means only that the memo is restricted to those to whom the memo is addressed. As to each and all of the above items, the jurors could not reasonably conclude otherwise. The plaintiffs' effort to connect the term "confidential" in each of these three distinct items to support an inference of malicious conduct by Armstrong represents yet another example of trying to create a picture where there is none.

Thus, the evidence upon which the plaintiffs rely does not support the inferences which they urged upon the jury. Through extracting and emphasizing portions of the evidence out of context, plaintiffs' counsel was able to persuade the jurors to make the impermissible inferential leaps that they did. Once again this Court's earlier analogy to a Dali painting is particularly apt. Another analogy may also be helpful. In the solar system, we are able to connect certain stars with lines to arrive at certain pictures (called constellations), such as the Big Dipper. Such lines would be permissible inferences, given the picture that emerges. In the present matter, plaintiffs have pointed to individual pieces of evidence and asked the jury and this Court to identify a clear, tangible shape from a diffuse, hopelessly unconnected splatter of stars. The picture does not

appear, despite counsel's energetic efforts and not inconsiderable powers of persuasion, because no lines (reasonable, permissible inferences) can be drawn between those stars. Again, plaintiffs' arguments appeal not to reason and objectivity, but rather to emotion, sympathy and speculation. Armstrong is entitled to J.N.O.V. as to punitive damages.

F. *Antitrust Claims*

Two antitrust claims were presented to the jury: TINS' claims that Armstrong used its alleged monopoly power in the alleged resilient floor covering market as leverage either to (1) acquire or (2) attempt to acquire a monopoly in the alleged market of "video magazine for floor covering retailers," in violation of Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2.

The jury found, by way of special interrogatories, that Armstrong enjoyed monopoly power in the resilient floor covering market or submarket, and used that monopoly power to obtain a monopoly in the video magazine for floor covering retailers' market or submarket.[26] Similarly, the jury found that Armstrong used its monopoly power in the resilient floor covering market to attempt to obtain a monopoly in the relevant video market or submarket. Whereupon, the jury awarded $19.5 million in compensatory damages on the antitrust claims.

This Court, reviewing all of the evidence, determines that no reasonable jury could have found for the plaintiff TINS on its antitrust claims. As the jury was instructed, an antitrust plaintiff must prove three elements in order to recover damages: (1) an antitrust violation (here, Section 2); (2) fact of damage or injury; and (3) measurable damages. *See e.g. American Bearing Co., Inc. v. Litton Industries*, 729 F.2d 943, 948 (3d Cir.), *cert. denied*, 469 U.S. 854 (1984); *Danny Kresky Enterprises Corp. v. Magid*, 716 F.2d 206, 209 (3d Cir. 1983). In the present matter, the jury should

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[26] Hereinafter, this alleged market will be referred to as the "relevant video market" recognizing that if it exists at all, it is the very specific market which the full term "video magazine for floor covering retailers" defines.

never have reached the damages questions because this case turns on proof of certain elements of the antitrust violations.

Briefly, the elements of the antitrust claims are as follows. First, for both the monopoly and attempt to monopolize claims, TINS was required to prove that there is both a relevant resilient market or submarket and a relevant video market, and that Armstrong enjoyed monopoly power in the resilient market. To succeed in its monopoly claim, TINS had to prove that Armstrong wrongfully acquired monopoly power in the relevant video market (as distinguished from achieving such a position as a consequence of superior product and the like). *See e.g. Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802, 808 (3d Cir. 1984), *cert. denied*, 477 U.S. 908 (1986).

To prove attempted monopoly, TINS had to prove that Armstrong specifically intended to monopolize the relevant video market and had a dangerous probability of success. *See e.g. PA Dental Association v. Medical Service Association*, 745 F.2d 248, 260 (3d Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985). In proving specific intent, "a mere intention to prevail over rivals or improve market position is insufficient. Even an intent to perform acts that can be objectively viewed as tending toward the acquisition of monopoly power is insufficient, unless it also appears that the acts were not 'predominantly motivated by legitimate business aims.'" (*Id.* at 260-261 (citing *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 627 (1953)). Direct evidence of specific intent is not required since it may be inferred from predatory or exclusionary conduct. (*Id.* at 261).

Of these elements, several are central to this Court's consideration of the present motions. First, this Court will consider whether the plaintiff[27] sufficiently proved that there is a resilient market or submarket, and second, whether it

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[27] In the portions of this opinion dealing with the tortious interference claims, the Court refers to plaintiffs in the plural because both TINS and Fineman were plaintiffs there. The Section 2 antitrust claims are TINS' alone, hence the use of plaintiff in the singular.

met its burden of showing that Armstrong had monopoly power in that market. The third consideration is whether it was monopoly power which Armstrong allegedly used to cause Stern to back out, rather than some other aspect of their relationship. Finally, this Court will consider whether plaintiff met its burden of showing either that Armstrong had or acquired monopoly power in the relevant video market or had a dangerous probability of success in its attempt to do so.

At this juncture, it should be noted that the jury could rationally and reasonably find sufficient similarity between TINS' and Armstrong's video products to determine that a market for video magazines for floor covering retailers exists, occupied at one time by TINS and Armstrong and now by Armstrong only. This determination is a uniquely factual one, and is arguably supported by viewing the videos themselves, as the jury was able to do. Therefore, this Court will not disturb the jury's finding as to the relevant video market.

1. *Resilient Market*

Review of the evidence in this matter clearly shows that the jury could reasonably have found that there is a resilient floor covering market or submarket. First, there was conflicting evidence as to whether resilient competes with carpet. (*See e.g.* Tr. 9.26 (Lerman); 10.62 (Pomianoski); 16.61-64, 67-70, 73-75 (Humphrey); 22.64 (Funsten)). The jury, weighing and determining the credibility of such testimony, could reasonably conclude that carpet and resilient are in separate markets or submarkets.

Second, contrary to defendant's argument, the jury could reasonably find that resilient and other hard surface floor coverings are in separate markets or submarkets. The evidence on the question was contradictory. (*See e.g.* Px. 6005 (Armstrong booklet on the differences between resilient and other hard surfaces); DePodwin's Report and testimony (Px. 1000D; 30.57-30.58); cf. Tr. 9.22 (Lerman); 8.126-127, 8.131-132 (Fineman); 10.63-10.64 (Pomianoski)). The jury's resolution of that issue will not be disturbed.

2. *Monopoly Power in the Resilient Market*

The second necessary element of both the monopoly and the attempted monopoly claims is proof that Armstrong had monopoly power in the resilient market. Generally, "monopoly power" is defined as the power to control prices or to exclude competition. *See e.g. PA Dental Association*, 745 F.2d at 260 (citing *United States v. E.I. dupont de Nemours & Co.*, 351 U.S. 377, 380 (1956)); *Weiss v. York Hospital*, 745 F.2d 786, 827 (1984), *cert. denied*, 470 U.S. 1060 (1985); *Borough of Lansdale v. Philadelphia Elec. Co.*, 692 F.2d 307, 311 (3d Cir. 1982).

A primary criterion used to determine whether a defendant has monopoly power in a relevant market is the defendant's market share. *PA Dental*, 745 F.2d at 260 (citation omitted). In fact, existence of monopoly power "ordinarily may be inferred from [a] predominant share of the market." *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). In *Grinnell*, the Court held that an 87% share of the market constituted monopoly power. (*Id.*) Similarly, in *American Tobacco Co. v. United States*, the Court held that "over two-thirds of the entire domestic field of cigarettes, and ... over 80% of the field of comparable cigarettes" constituted "substantial" monopoly power. 328 U.S. 781, 797 (1946). *See also Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 489 n. 11 (5th Cir. 1984) (citing cases finding monopoly power where market shares ranged from 70% to 100%).

At the other end of the spectrum, a market share of 35% was insufficient as a matter of law to establish monopolization. *PA Dental*, 745 F.2d at 261. *See also Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 666 (7th Cir.), *cert. denied*, 484 U.S. 977 (1987) (citing cases where defendant had less than 25% of the market share, and so did not have monopoly power). In general, most courts accept the rule of thumb enunciated by Judge Learned Hand, that while a 90% market share definitely is enough to constitute monopolization, "it is doubtful whether 60 or 64 percent would be enough; and certainly, 33 percent is not." *United States v. Aluminum Company of America*, 148 F.2d 416, 424 (2d Cir. 1945), *approved and adopted*, *American Tobacco*, 328 U.S. at 811-

814. *See e.g. Broadway Delivery Corp. v. United Parcel Service*, 651 F.2d 122, 129 (2d Cir.), *cert. denied*, 454 U.S. 968 (1981) ("[A] market share below 50% is rarely evidence of monopoly power, a share between 50% and 70% can occasionally show monopoly power, and a share above 70% is usually strong evidence of monopoly power.")

Many cases suggest that absent special circumstances, a defendant must have a market share of at least fifty percent before he can be guilty of monopolization. *See e.g. Domed Stadium*, 732 F.2d at 489 and n. 11. The same is true with attempted monopoly claims: a market share in the middle of the spectrum requires proof of additional factors before such an attempt may be found. (*Id.* at 490-491).

The evidence in the present matter regarding Armstrong's share of the resilient floor covering market as of 1984[28] is somewhat conflicting. Since the jury was not asked to make a specific determination on the verdict sheet regarding this market share, this Court will, as it must, assume that the jury believed plaintiffs' evidence and determined that Armstrong's share is approximately 50%. As a matter of law, this market share is not alone determinative of whether or not Armstrong had monopoly power in the resilient market.

The plaintiff places considerable emphasis upon evidence that the defendant's market position was "dominant." (Plaintiffs' J.N.O.V. Opp. at 45-46 and evidence cited therein). This evidence is not sufficient to overcome the fact that a 50% market share is not determinative. It is obvious that the term "dominant" (and other such language) reasonably includes a determination that Armstrong had a 50% market share. It is unreasonable, however, to infer from such language that Armstrong had a significantly greater percentage of the market than that.

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[28] The relevant time period on the question of monopoly power in resilient is 1984, since that is the time at which Armstrong allegedly acted.

Because the market share in the present matter is not determinative of monopoly power, other factors must be considered.

> Other relevant factors that the courts have identified include: the size and strength of competing firms, freedom of entry into the field, pricing trends and practices in the industry, ability of consumers to substitute comparable goods [or] services from outside the market, and consumer demand factors. A defendant's power either by itself or aided by these other factors must be enough to restrict entry, supply or price.

Weiss, 745 F.2d at 827 n. 72. (citations omitted). *See also U.S. v. DuPont*, 351 U.S. at 403-404 (other evidence, including that showing size and strength of competitors, showed that defendant did not have market power); *Reazin v. Blue Cross and Blue Shield of Kansas*, 899 F.2d 951, 970-972 (10th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 3241 (1990) (reviewing other evidence where market share was at most 40% to 60%); *U.S. v. Syufy Enterprises*, 903 F.2d 659 (9th Cir.1990) (where market share is high enough to create inference of monopoly power, inference may be overcome by evidence of low entry barriers or inability to control prices or exclude competitors)).

This Court finds that the record critically lacks that minimum quantity of evidence of such additional factors which would support a finding that Armstrong had monopoly power in the resilient market. First, there was no evidence that Armstrong had the ability to raise prices in the resilient market. In fact, the only evidence was to the contrary. For example, Daniel Proctor, Vice President of a floor covering distributor who distributed Armstrong products and others, testified that Armstrong has not always been successful in raising prices. Mr. Proctor described a recent example: on November 1, 1990, Armstrong raised its prices but "had to roll back because, quite

honestly, a lot of our competitors did not raise their prices." (Tr. 25.56).

The plaintiff also made much of the evidence that Armstrong's market share has increased in the period from 1984 to 1990. (*See* Px. 5108). This evidence is nonetheless insufficient to support a finding of monopoly power in the resilient market. First, the increase has not been yearly, as demonstrated by Mannington Mills' report showing a decrease in 1989. More importantly, however, the increase reflected in this report is not substantial, showing a total increase of 3.6% for the period between 1985 and 1990. Finally, the same report shows that two of Armstrong's top competitors have experienced an increase in market share over the period and two have experienced a decrease. Thus, while the evidence shows that Armstrong has experienced an overall increase in market share, it is insufficient to support a finding of monopoly power, particularly as of 1984.

The evidence about the size and strength of competitors in the resilient market also shows that Armstrong does not have monopoly power in that market. Fred Lerman, owner of a floor covering distributor that had distributed TINS' video magazine, testified that "our industry is very competitive and everybody that's in business tries to have what I would consider an edge over competition". (Tr. 9.15). Mr. Proctor testified that the floor covering business is very competitive. (Tr. 25.56). James Starks, employed by a competitor of Armstrong, testified that the top three competitors held approximate market shares of 15.2%, 10.9%, and 7.8%. (Tr. 10.117; see also Px. 5108). These unrefuted values, which the jury was not free to ignore, are not insubstantial, and clearly show that Armstrong's competitors are effective forces in the market.

The plaintiff relies heavily on the fact that many floor covering distributors are "captive", in that they sell certain products made by only one manufacturer. (*See e.g.* Px. 1000H, "The Impact of Tariff and Nontariff Barriers on the U.S. Sheet Vinyl Flooring Industry"). Because this system is employed by all major domestic manufacturers of resilient, however, that evidence relates to the definition of the resilient market, not

whether Armstrong has monopoly power in it. The evidence showed that the nature of this particular market is that a manufacturer distributes products through several particular distributors who do not carry the same product manufactured by others. This structure is not the result of any monopolization effort, but rather is a systemic, common practice in the industry. (*See e.g. Houser v. Fox Theatres Management Corp.*, 845 F.2d 1225, 1231 (3d Cir.1988) (common practice in the industry necessarily serves legitimate competitive purpose)). The jury could not reasonably conclude from this evidence that Armstrong had monopoly power, because all major resilient floor covering manufacturers operate primarily through captive distributors. Stated somewhat differently, a manufacturer's economic influence over a distributor is a reflection of the one-on-one relationship between that manufacturer and distributor, and so is not probative evidence of monopoly power.

There was also unrefuted evidence that, within the resilient market Armstrong did not even "control" the top distributors. In a list of the top 50 distributors for 1983, only three of the top 10 distributors carried Armstrong resilient products at all. (Px. 623). Of the top 50, only 17 (or 34%) distributed Armstrong resilient products. (*Id.*) Such evidence does not support a finding that Armstrong had monopoly power in the resilient market, and in fact refutes such a finding.

There is considerable evidence that consumers can substitute other hard surfaces and even carpet for resilient products. (*See* discussion regarding resilient market, above). Such evidence, although not determinative of market definition in this case (*supra*), constitutes yet another factor weighing against the reasonableness of the jury's determination that Armstrong had monopoly power in the resilient market.

The plaintiff also relies on various other bits of evidence to oppose the defendant's motion. First, plaintiff asserts that "testimony disclosed that the profits of Armstrong distributors are substantially higher (approximately 300% higher) than those of other distributors." (Plaintiffs' J.N.O.V. Opp. at 46 (citing Tr. 15.68)). Review of the record indicates, however, that this is a mischaracterization of Mr. Humphrey's testimony. His testimony was that Mr. Fineman had indicated

that the usual profit was 1%, and he, Mr. Humphrey, said that was wrong, and pointed to Armstrong distributors' profits of approximately 3%. Humphrey's testimony was not to the effect that Armstrong distributors receive 3% profit while others receive 1%, as the plaintiff claims, but rather was contradictory evidence of profit margins in the industry as a whole, using Armstrong's distributors as an example. This testimony provides no support for the plaintiff's position. The plaintiff also asserts that "Armstrong's advertising expenditures greatly exceed that of its competitors." (Plaintiffs' J.N.O.V. Opp. at 47 (citing Mr. Fineman's testimony at Tr. 1.36)). Once again, the plaintiff mischaracterizes the evidence. The entire relevant section is as follows:

> Q. [Mr. Kramer] Now, did you ever have occasion to compare the revenue that Armstrong enjoyed with the revenue of its closest competitor?
>
> A. Yes, I did.
>
> Q. What was the ratio?
>
> Mr. Voorhees: Excuse me, your Honor. I believe some foundation --
>
> The Court: No context, no time frame. Objection sustained.
>
> Mr. Kramer: Yes, your Honor.
>
> Q. During what time period did you have occasion to make this comparison?
>
> A. I, through my whole -- I spent 21 years in the floor covering industry. 14 of them at Benjamin Berman and then seven with my own consulting company and with

Tins [sic]. Certainly over the period of my consulting years I got to be very familiar with figures for Armstrong; what they spent on advertising, what they spent compared to the [sic] competitors, what their market position was relative to their competitors. It was just information I needed to have to do my business of consulting.

Q. Now, based upon that, did you have any estimate of about how many times, if at all, Armstrong was bigger than its next closest competitor, let's say in advertising revenue for any given period?

Mr. Voorhees: We've narrowed it down to three years, but there's still no explanation [sic] what documents.

The Court: Advertising revenues.

Mr. Kramer: I'm sorry, your Honor, advertising expenditures.

The Court: Overruled. Set a time frame.

Q. Set a time frame before you answer the question, Mr. Fineman.

A. Well, I had, for example, another visual aid which will show that over a period of a three-year period I believe 1984 through 1987--

> Mr. Voorhees: Excuse me, your Honor, could we see the visual aid?
>
> The Court: It's an appropriate moment for the jurors to take a recess anyway.

(Tr. 1.35:21-1.37:9). Thus, Mr. Fineman never answered the question about Armstrong's advertising expenses.[29] It is well settled that an attorney's question does not constitute evidence in a case, and so plaintiff's argument concerning this "evidence" is without merit.

Thus, each of the factors which must be considered weigh only against a finding of monopoly power. Even taken together and considered in a light most favorable to the plaintiff, the evidence in this case is critically deficient and does not support a reasonable jury finding that Armstrong had monopoly power in the resilient market. Accordingly, Armstrong is entitled to J.N.O.V. as to this element, which is enough, by itself, to justify J.N.O.V. as to the plaintiff's two antitrust claims. Nonetheless, this Court will consider proofs as to additional elements as well.

3. *Use of Monopoly Power*

Even if this Court held that the jury correctly determined that Armstrong had monopoly power in the resilient market, it would be compelled to grant Armstrong's motion on the question of whether it was this monopoly power which Armstrong used with Stern.

As explained above, one element of the plaintiff's monopoly claim is that Armstrong willfully acquired or maintained monopoly power in the relevant video market, or, attempted to do so. *See e.g. Houser*, 845 F.2d at 1230. In

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[29] Indeed, the document upon which Fineman was going to base his testimony was not admitted into evidence. (Tr. 1.38-1.52 (voir dire of witness and sidebar discussions)).

other words, the defendant must have acted without a legitimate purpose, and the result complained of was not the result of natural skill, competition, and so forth. (*See e.g. id.* at 1231) (Act complained of was common in the industry and served legitimate purpose, and therefore was not a basis for inferring that the purpose of the act was to willfully maintain monopoly power.)

The specific allegation here was that Armstrong used its monopoly power in the resilient market to catapult itself into the relevant video market by causing Stern to withdraw from the Letter of Intent to become a TINS distributor. (*See e.g.* Plaintiffs' J.N.O.V. Opp. at 12 n. 4: "the same conduct that amounted to tortious interference with contract under state law was independently a violation of the federal antitrust laws because Armstrong leveraged its monopoly power in one market to obtain monopoly power in another"). In other words, the plaintiff's claim is that "the same conduct" of Armstrong which constitutes the alleged tortious interference is also the basis for the antitrust violation. This Court determines that even if the tortious interference claim was sustainable,[30] such conduct is not even arguably the exercise of monopoly power. Therefore, even affording to plaintiff all the evidentiary indulgence that a J.N.O.V. motion requires, no jury could reasonably have concluded that it was.

The evidence in this case, as described above, shows that "captive" distributors are the norm in the industry. By definition, manufacturers are able to exert influence over their distributors; this influence is not, however, exercise of monopoly power. Monopoly power is concerned with the manufacturer's ability to affect an entire market. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962) (The antitrust laws were enacted for "the protection of competition, not competitors.") (emphasis in original). In contrast, the "influence" available to manufacturers like Armstrong depends on the relationship between a manufacturer and each individual distributor. Where the manufacturer supplies a high percentage of the distributor's

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[30] Of course, it was not, as earlier portions of this Opinion reflect.

inventory, or has extended substantial credit to the distributor, a degree of influence or control is to be expected and is therefore reasonably inferred. In addition, exercise of that control is usually within the realm of permissible and legitimate business conduct. Even where exercise of such influence is wrongful, it is necessarily limited to the individual distributor being affected, and therefore does not constitute exercise of monopoly power.[31] Accordingly, evidence related to Armstrong's influence over Stern does not support a reasonable finding that the exercise of any such influence constituted the use of monopoly power.

In addition to evidence showing the customary structure of the industry, there was considerable evidence about the specific relationship between Stern and Armstrong. In particular, Stern was extended substantial credit by Armstrong, and was undercapitalized even to the point of becoming a troubled company, in Armstrong's view. (*See* Px. 5014 (regarding security agreement between Armstrong and Stern); Px. 5015 (regarding personal guarantee of Abrahamson on credit extended by Armstrong to Stern)). Assuming, for purposes of the present analysis, that a reasonable inference from such evidence is that the unique position of Armstrong with respect to Stern would have permitted it to influence (or even coerce) Stern's decision not to become a TINS distributor, that is not the exercise of monopoly power. Any conclusion to the contrary is not supported by the evidence, is not reasonable, and is insufficient to sustain the jury verdict. It was the plaintiff's burden to prove that elimination of TINS from the relevant video market was the result of Armstrong's exercising its resilient market *monopoly* power (not some other power) upon Stern. The plaintiff failed to produce sufficient evidence of this element upon which the jury could reasonably find in it's favor.

Thus, the plaintiff's claims of monopolization and attempted monopolization of the relevant video market must fail

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[31] More specifically, in the case at bar, the record is devoid of any evidence that Armstrong in 1984 discouraged any of its other distributors from becoming TINS distributors. Indeed, Sound, Tri-West and Funston did so, and Bebco had signed a Letter of Intent and paid a deposit.

because the defendant did not use any monopoly power in the resilient market to persuade Stern to back out. Once again, this failure is sufficient by itself to justify granting defendant's motion for J.N.O.V. as to both antitrust claims. There is, however, yet another reason for granting the motion which the Court will now discuss.

4. *No Monopoly or Dangerous Probability of Success*

The plaintiff's claim that Armstrong used its monopoly power to monopolize the relevant video market requires proof that Armstrong in fact acquired monopoly power in the relevant video market. The legal standards for this determination are the same as those relating to the question of whether Armstrong had monopoly power in the resilient market, described above. That is, monopoly power is defined as the power to control prices or to exclude competition. Several factors must be considered here. In the present matter, no reasonable jury could conclude that Armstrong had monopoly power in the relevant video market either in 1984 or since.[32] The evidence is uncontroverted that Armstrong's videos are restricted to information about Armstrong products, and are therefore of no interest to non-Armstrong distributors and retailers. As indicated above, Fineman testified that there are about 450 floor covering distributors. The evidence actually shows that only about 70 distributors received Armstrong's videos in 1984, which represents only about 15.5% of all available distributors. Of these, most did not send the videos to retailers. (Tr. 1.59 (Fineman); 16.55, 17.122-123 (Humphrey); 21.108, 21.110, 21.134-135, 21.140-44 (Downey)). Clearly, this market share is, if anything, evidence of lack of monopoly power in the relevant video market. The evidence also shows

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[32] Armstrong argues that the only relevant period is 1984, the time of the alleged acts. If this is correct, however, no antitrust plaintiff could ever succeed in a leveraging case in which the defendant first removed the plaintiff from the market and then inserted itself at a later date. Certainly, the antitrust laws cannot be skirted by such timing of entry into the market. Furthermore, references throughout this opinion to Armstrong's videos should be deemed to refer to all such products produced or planned over the years to the present date, including the present disc medium Floor Fashion Centers.

that of the top 50 floor covering distributors, only 17 (or 34%) distribute Armstrong products. (Px. 623).

The only reasonable inference from this evidence is that Armstrong's video was of absolutely no interest to approximately 66% of the largest distributors in the market. At most, Armstrong could be said to control 34% of the relevant video market.[33] As the discussion concerning monopoly power in the resilient market shows, 34% of the market is insufficient as a matter of law to support a finding of monopoly power.

Furthermore, consideration of the other factors relevant to the monopoly power determination only supports the inevitable conclusion that no reasonable jury could have determined that Armstrong had monopoly power in the relevant video market. The only evidence as to competitors in the market shows that other manufacturers do produce video programs for their captive distributors, thus showing their size and strength. Furthermore, any other floor covering manufacturer could very easily enter the field by simply providing similar services to its distributors. It is evident from such evidence that Armstrong has no ability to restrict entry into this market, and certainly cannot affect the supply or price of videos which non-Armstrong wholesalers or retailers would be interested in purchasing.

The fact that the jury found that Armstrong is the only company in the relevant video market does not alter these conclusions. The uncontroverted evidence in this matter showed that Armstrong never targeted and does not distribute its video

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[33] It should be recalled at this point that the relevant video market, which the jury reasonably found existed, was not restricted to either Armstrong or non-Armstrong retailers, but in fact included both. Additionally, even if this figure regarding wholesalers does not translate exactly into the same nationwide percentage of retailers, it demonstrates the vast percentage of the market in which Armstrong has no interest and vice versa. Indeed, the record evidence is that Armstrong's penetration of all retail outlets is even smaller because Armstrong sells only through wholesalers while many other manufacturers sell directly to a vast number of retail outlets without intervening wholesaler/distributors. See the considerable evidence introduced by plaintiff to establish a multitude of potential customers for the TINS video magazine.

products to the hundreds of wholesalers who do not carry Armstrong products. These non-Armstrong wholesalers (and *their* retailers) constitute a viable and substantial segment of the floor covering industry. (*See e.g.* Px. 623 discussed above). Thus, Armstrong has not achieved a monopoly in the relevant video market. There is too large a segment of that market which, although arguably not now serviced by such a magazine, could be, without any proven pressure or likelihood of presence therein by Armstrong.

The same evidence also requires this Court to grant Armstrong's motion on the attempted monopoly claims. In order to succeed with a claim of attempt to monopolize, the plaintiff must show, *inter alia*, that there was a dangerous probability that the defendant would have successfully achieved a monopoly. *Stearns v. Genrad, Inc.*, 752 F.2d 942, 947 (4th Cir. 1984) (citations omitted). Although the courts "must be particularly wary of the numbers game of market percentage when considering an 'attempt to monopolize' suit ... a defendant must have some legally significant share of the market before he approaches the level of dangerous probability of success condemned by the attempt provision of section two." *Domed Stadium*, 732 F.2d at 490 (citations omitted).

A "legally significant share" of the market, although lower than the market share required for a presumption of monopoly power, is nonetheless substantial.

> We do not suggest here a market share percentage that of itself rises to the level of legal significance, but note that a share of less than fifty percent generally required for actual monopolization may support a claim for attempted monopolization if other factors such as concentration of market, high barriers to entry, consumer demand, strength of the competition, or consolidation trend in the market are present.

(*Id.*, citations omitted).

In the present matter, Armstrong sold or otherwise distributed its videos to considerably less than 50% of the relevant video market. Accordingly, other factors become important. While there is evidence showing barriers to entry into the resilient market, there is no such evidence concerning the relevant video market. Plaintiff's reliance on the former is simply irrelevant as to the video market.

Similarly, there is no evidence relating to the other factors described by the *Dome* court which would otherwise suggest that Armstrong had a dangerous probability of successfully monopolizing the relevant video market. Indeed, the only evidence shows that a significant majority of the relevant market (that segment which does not distribute Armstrong products at all) has no interest in obtaining Armstrong videos. It cannot be said as a matter of common sense and reason (the proper standards for a jury verdict) that Armstrong attempted to monopolize a market wherein such a large segment would never be targeted for or interested in Armstrong's video products.

Thus, the structure of the relevant video market itself precludes a finding of dangerous probability of success. The unrefuted evidence necessarily negates a finding of specific intent to monopolize because Armstrong has no intent (and certainly no reason) to sell its videos to non-Armstrong distributors. Indeed, all of the memos upon which plaintiffs place great emphasis express the concern that participation by an Armstrong distributor in TINS reduces resources available to devote to selling Armstrong products. Furthermore, non-Armstrong distributors constitute approximately 66% of the 50 leading distributors. Even an intent to sell to 34% of that portion of the market cannot, without more, support a reasonable inference of specific intent to monopolize. This is particularly true where the conduct involved is not in itself egregious or invidious, as the Court has determined in the present case. *See e.g. PA Dental*, 745 F.2d at 261 (Specific intent to monopolize may be inferred from predatory or exclusionary conduct; necessarily, if there is no such conduct, other evidence is crucial).

In summary, then, this Court finds that the evidence proven in this matter critically fails in several crucial respects. First, no reasonable jury could have found that Armstrong had monopoly power in the relevant resilient market. Second, no reasonable jury could have found that even if Armstrong did have such power, it was the exercise thereof which caused Stern to back out of its relationship with TINS. Finally, no reasonable jury could have found that Armstrong has monopoly power in the relevant video market, or that it was dangerously likely to gain such power and had the specific intent to do so.

CONCLUSION

Throughout the foregoing sections of this lengthy opinion, the Court has necessarily commented upon some of the evidence. Although some other items of arguably relevant evidence have not been cited, they have not been ignored. With the benefit of a full transcript and the trial exhibits, the Court has reviewed the complete record. As stated frequently in this opinion, when ruling on a motion for judgment n.o.v. this Court may not substitute its own views for those of the jurors if the latter are reasonably based upon an arguable construction of the evidence. The Court has taken seriously its limited scope of review of the evidence. It has not made its own assessment of the credibility of witnesses. It has not invoked testimony from witnesses whose credibility has been seriously challenged by the plaintiffs. It has indulged all reasonable, permissible inferences, on issues pertinent to the present motions, in favor of the plaintiffs. Evidence invoked by the Court has predominantly (if not exclusively) been that which was stipulated, uncontested, unrefuted and/or presented by the plaintiffs themselves. Viewed in light of the proper standards for considering a motion for J.N.O.V. (*see supra* at 12-13 and *passim*), the Court has exercised its obligation on such motions in order that the "sound" law will control this case rather than "simply drift off into irrelevance" due to the jury's unsupportable "will." *Drabkin v. Alexander Grant & Co.*, 905 F.2d 453, 458 (D.C. Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 559 (1990).

For the reasons set forth above, this Court grants defendant's motions for judgment n.o.v. as to all verdicts

rendered by the jury in favor of the plaintiffs or either of them. An Order For Judgment Notwithstanding the Verdict has today been filed with the Clerk of the Court.

JOHN W. BISSELL
United States District Judge

DATED: June 20, 1991

[ORAL RULING GRANTING DIRECTED VERDICT FOR DEVELOPMENT ON SHERMAN § 1 CLAIM]

[JA 3679] THE COURT: This Court has before it a number of motions for directed verdict which I will rule upon at this time, and we will then proceed with the commencement of the defendant's case.

First, with regard to the common law tort claim for tortious interference with a contractual relationship and/or prospective economic relationship, the Court first determines that New Jersey law will be applied in this matter.

I note initially that my review of the Connecticut case cited by the defendants did not lead me to the conclusion that was argued for by Mr. Wilson. But be that as it may, it is quite clear the dominant governmental interest as well as the most significant particular contacts in this case lie with New Jersey, and more particularly, of course, that being the home state of TINS and Mr. Fineman.

The motion to have the Court impose a directed verdict in favor of the defendant on that claim is also denied. I now turn to the two antitrust claims, which for shorthand purposes we'll call Section 1 and Section 2 claims. I might add this Court's rulings apply equally in my perception not only to the federal antitrust laws but any state antitrust laws as well.

It may well be because there was little argument that interstate commerce was here, this case will be submitted to the jury under the federal law. That is a bridge we can cross [JA 3680] later. It is not critical at this time. I'm quite mindful of the limited New Jersey prudence under the New Jersey act making reference that federal law on these minor provisions

should be considered controlling under the New Jersey terminology as well.

The Section 1 claim which this Court has construed to be as a claim for conspiracy in restraint of trade simply alleged conspiracy between Armstrong and Stern to have an impact, a restraint of trade in the video magazine market. I'm using that terminology loosely. It may be some other technical term that's governing in this case. That claim is dismissed.

Motion on behalf of defendant is granted. I will amplify this opinion at a later time if requested to do so under our local rules. It's this Court's view, however, that under the Columbia Metal case cited by the plaintiff himself for other features, there remains necessity for Section 1 conspiracy claim a unanimity of purpose, a common design and understanding between the coconspirators charged.

In this case, while it might be said that there is a unanimity of purpose or common design and understanding to commit the tort of the disruption of the contractual relationship between Stern and TINS, under no set of circumstances based on this record could the jury reasonably find that Stern shared Armstrong's purpose of eliminating TINS from competition in the video magazine market.

I have studied all the cases that have been cited to me [JA 3681] on this point. I have reviewed particularly such cases as Fragale and Sons and Monsanto to see if they in any way abridge the unanimity or purpose of common design understanding element that Columbia Metal endorses, of course, has its origins at least as early as the American Tobacco case. I find that it does not.

And while, therefore, I think some of those other cases might clearly point to the presence of a conspiracy and something other than merely independent action or decisions, nevertheless, as I construe a Section 1 requirement, this unanimity purpose, common design understanding which must be an object of a legal antitrust injury is not present here, because under no circumstances could it be said that Stern was out here to destroy TINS and eliminate it from the video magazine market.

Stern has had no interest. Whether Stern's went ahead with other distributors or not, there was no evidence in the case that would indicate to the contrary. Accordingly, the Section 1 claim is dismissed. Under that same reasoning with regard to Section 2 claim, any subclaim under Section 2 of a conspiracy to monopolize is also dismissed.

The claims, however, for attempt to monopolize or monopoly by Armstrong in this video magazine market survive. Those don't depend on the establishment of any conspiracy of Stern under a unanimity of purpose or common design and understanding. There is certainly ample evidence to be [JA 3682] presented to the jury with regard to all of the remaining elements of that Section 2 claim. Accordingly, the motion with regard to those features of the Section 2 claim is denied.

I can only assure counsel, hopefully, so the Court took into account pronouncements such cases as Fragale and others regarding what is properly the function of the jury and what is properly the function of the Court into the level of Seventh Amendment analysis. But, nevertheless, it made the rulings I have disclosed at this time. Anything further?

MR. KRAMER: Just very briefly your Honor, if I may suggest the one thing I did not mention during oral argument

yesterday is the doctrine under antitrust law which your Honor may very well be familiar with of unwilling conspiracy. And in the Albreath Herald (phonetic) case the Supreme Court in a footnote made it clear. And what I'm trying to do is reconcile that holding with what your Honor has ruled today.

I'm having, frankly, some difficulty that a coerced alleged conspirator is sufficient under Section 1 purposes. If in this case some definition by someone who is coerced totally. Someone who is coerced cannot claim the same purpose as the coercee. Coercee would not need to be coerced. The last note of the Herald case -- I have the cite.

The Supreme Court for the past 25 years has adhered to that, you don't need to show -- the only common purpose and, you know, perhaps it's certainly my fault in not being sufficiently [JA 3283] articulate enough yesterday. But the only purpose of the common purpose rule is to that they have a common purpose to engage in the acts alleged, not a common purpose of the ultimate goal.

In other words, there's traditional jury instructions under Section 1 that say alleged coconspirators are alleged to intend natural consequences of their acts. May or may not have a point to charge on that.

THE COURT: The Third Circuit in 1990, the elements of this type of claim were reviewed in more general language and required them to agree the objects of a conduct pursuant to that contract or conspiracy were illegal. In this Court's view, illegal must be construed as being an antitrust objective rather than just some other type of illegality that would be tied to conspiracy to interfere with contractual relationship, something like that.

MR. KRAMER: See that's, that's the distinction I'm trying to draw. In other words, under Section 1 as I read those cases, for the past 30 years the Supreme Court has made it clear that to be sure you have to show common purpose, but you don't have to show the thoughts of each conspirator's minds, intent, motive where identical in any case or you barely have an antitrust case except for price fixing.

THE COURT: You wouldn't have to show it definitively, could be shown by proper inference where it lay. I don't want to get into a lengthy discussion on this. Most of the cases you [JA 3684] cited to me would legitimately support an inference from the evidence that the coconspirator would have the same legal antitrust objective as the primary conspirator shall we say.

In many instances that's because the coconspirator is often a distributor in direct competition with the victim. Here *we* have a different set of circumstances. For that reason I think one can't automatically draw that inference based upon the presence of competition or potential competition between those two. That's why I think it was necessary for rather extensive search of the record.

I can assure you for evidence upon which the jury couldn't conclude that this particular antitrust objective was a shared one. Now, I understand your point with regard to coercion, but it seems to me that even the coerced coconspirator has got to be coerced into acquiescence with the antitrust objective. If he is not, if his objectives are other than that, you may well have a conspiracy for this other type of injury but you don't have it for antitrust. That's my ruling.

MR. KRAMER: Yes, your Honor.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5613

ELLIOT FINEMAN; THE INDUSTRY NETWORK SYSTEM, INC.

Appellants

vs.

ARMSTRONG WORLD INDUSTRIES, INC.

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 84-03837)

Present: Stapleton and Mansmann, *Circuit Judges*, and Fullam, *District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel March 3, 1992.

On consideration whereof, it is now here ordered and adjudged by this court that the orders of the said District Court entered June 20, 1991, June 25, 1991, be, and the same are hereby affirmed insofar as the District Court granted judgment

n.o.v. to Armstrong on the Sherman Act section 2 claim and Fineman's individual tort claim, reversed as to the order of the District Court granting judgment n.o.v. on The Industry Network System, Inc.'s ("TINS") tort claim and affirmed as to the grant of a new trial on that claim. It is further ordered and adjudged that the judgment entered in the matter is also vacated as to the order directing that a verdict be entered on the Sherman Act section 1 claim and as to the summary judgment on the breach of contract claim. The cause is remanded to the District Court for a new trial on TINS' tortious interference, breach of contract and Sherman Act section 1 claims. The assignment of costs will be set forth at a later date. All of the above in accordance with the opinion of this Court.

ATTEST:

Clerk

October 28, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5613

Fineman, et. al.,

Appellants

vs.

Armstrong World, Industries, Inc.

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*,
BECKER, STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN, NYGAARD,
ALITO, ROTH and LEWIS, *Circuit Judges*,
and FULLAM, *District Judge.

The petition for rehearing filed by appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in

regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judges Becker and Scirica would have granted rehearing.

BY THE COURT,

_____
Circuit Judge

Dated: November 24, 1992

*Judge Fullam voted only as to panel rehearing.

Roth Deposition Testimony Read
Into Evidence by Plaintiffs

[JA 3034] Q. Did Mr. Guzinsky say anything about Mr. Abramson's comments about TINS?
A. I don't recall.

Q. And your testimony under oath is that all you said to him was what you have told me, that you were surprised, you expressed this surprise to him and the surprise over the fact that you had or Armstrong had its own video that seemed to you, at least, to be overlapping with TINS?
A. That's correct.

Q. And that was it, end of discussion, [JA 3035] never came up again during that meeting, during dinner? Did you drive Mr. Abramson back to the airport?
A. No, I left both of them at dinner.

Q. During dinner, during that meeting, I want to make sure you understand my question clearly, it was never mentioned again. Is that your sworn testimony?
A. I recall what I have told you.

Q. Did you say to him Alan, I don't think this makes a lot of sense in the Armstrong scheme of things, given the fact that we do have our own video program that can help you increase your profitability, that type of thing?
A. That's probably what I said because we have an overlap program.

[JA 4079] Q. Just what in general terms was the subject to that two, three hours?

A. Well, what I just mentioned. And I think -- well, a lot of it was spent on Stern taking advantage, more advantage of the promotional efforts that we had offered from the resilient side. Bob talked to him about carpeting. At that time he told us about he had signed up for TINS.

Q. That was going to be the next question.
Did TINS come during the course of the discussion?

A. Alan said he signed up for TINS.

Q. Is that pretty much what he said to open up the discussion?

A. As I recall.

Q. Did you respond to it?

A. I was surprised.

Q. You told him that?

A. Yes, I did.

Q. And did you say anything else?

A. Well, I was surprised because I was under the impression at the time that TINS was very similar to what we had been doing as a company for many years, dealer training. It didn't make any sense to me why if he had this program he would want another [JA 4080] program. I was surprised.

Q. Did Mr. Abrahamson say anything to you when you expressed this surprise?

A. As I recall, I think he made a statement that it would fill in a void that we didn't have something like that.

Q. Did he explain to you what about TINS he believed would fill a void that Armstrong didn't serve in this nation? Did he say something?
A. I can't really be specific. At that time I had never seen a TINS video, so I don't really recall specifically what he said. I know he said that, but specifically I don't.

Q. So your best recollection is he said something along those lines?
A. Right.

Q. TINS does something that the Armstrong program doesn't do?
A. Right. I think he said something like that.

Q. Did you respond to that comment?
A. I don't think so.

Q. How was it left? How long did their discussion about TINS last would you say?
A. As I recall, it was a fleeting discussion. We went on to something else.

To ALL FLOOR DIVISION DISTRICT MANAGERS June 12, 1984

From J.E. HUMPHREY, Fl Div, Lancaster

Subject TINS

CONFIDENTIAL

A number of our wholesalers have elected to participate in The Industry Network Systems (TINS), which is a monthly video magazine for floor covering retailers. The monthly video magazine features several segments designed to bring retailers' ideas and information. The TINS program is made available to retailers on a yearly subscription basis, which is merchandised by local distributors. As stated before, we are not in a position to evaluate the effectiveness of the TINS program; however, we feel that since all Armstrong wholesalers are not involved in the program, it would be improper for Armstrong to participate in the system. Therefore, if any wholesalers request Armstrong's participation, either on a local level or a national basis, you should inform them that we are unable to offer any assistance. You should make sure that your representatives are not involved in any sales presentations on this system or any other program not provided by Armstrong. Please explain to your wholesalers that our desire not to participate in their program is not due to a lack of interest in retailer training. Quite to the contrary, we have been very much involved with retailer and wholesaler salesmen training in such programs as "Take Charge," and plan to add to this training program which reaches *all* Armstrong wholesalers and retailers.

If you have any other questions about the TINS system or about our participation, please feel free to contact me.

DMN

Supreme Court, U.S.
FILED
FEB 2 1993
OFFICE OF THE CLERK

No. 92-1201

IN THE
Supreme Court of the United States

October Term, 1992

ARMSTRONG WORLD INDUSTRIES, INC.,
Petitioner,

v.

THE INDUSTRY NETWORK SYSTEM, INC.
AND ELLIOT FINEMAN,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INTRODUCTION

Taken at face value, the petition for certiorari by Armstrong World Industries (Armstrong) amounts to little more than the assertion that the Court of Appeals for the Third Circuit misapplied settled law in a fact-intensive case -- a reality that even Armstrong itself seems to recognize, since the primary relief it seeks in this Court is not plenary briefing and argument, but summary reversal. Even crediting Armstrong's arguments, there is no warrant to expend this Court's limited resources on this case, either as a matter of summary consideration or plenary review:

- Armstrong's argument is chiefly a sufficiency-of-the-evidence claim. This case turns on its own particular facts and has no precedential implications. As the court of appeals explained, "[a] thorough review of the record is necessary because this appeal is so fact specific." Pet. App. 5A.[1]

- This case contains parallel claims under federal and state antitrust law, as well as under state tortious interference law, so that any decision by this Court would likely be irrelevant to the outcome of this case.[2]

- This case is being remanded for a new trial, so that if the jury were to return a verdict for plaintiff-respondent The Industry Network System (TINS) on its federal antitrust claim, Armstrong could once again seek review in this Court. Consideration of the case by this Court is premature at this time.

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[1] Citations to the Appendix to the petition will be styled "Pet. App. ____A." Citations to the Joint Appendix in the court of appeals will be styled "JA____."

[2] Armstrong's argument that TINS' state-law tortious interference claim would be "not likely to survive" if this Court were to rule that the inferences drawn by the jury and the court below were precluded by substantive federal antitrust law (Pet. 7 n.6), flies in the face of the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938); *see also California v. ARC America Corp.*, 490 U.S. 93, 100-102 (1989). Because the case is being remanded for a new trial, Armstrong's reference (Pet. 7 n.6) to the punitive damages award and to *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991), is curious indeed -- especially since at trial Armstrong made a strategic decision not to object to the district court's jury instructions on punitive damages and therefore in any event would be barred under Federal Rule of Civil Procedure 51 from raising any objections now.

Review would be inappropriate even if Armstrong's arguments were credited. But Armstrong's allegations cannot be credited. Indeed, the entire petition for certiorari rests on blatant and wholesale mischaracterizations of the decision below. For example, the premise of the first question presented -- that the court of appeals' judgment rested on "a single oral comment by petitioner's local sales manager to one distributor-customer" -- is a complete fabrication. The second question seizes on one off-hand phrase in the court of appeals' opinion and simply ignores the court's extensive legal analysis. The third was not even raised below and in any event has no merit.

The Third Circuit denied panel rehearing and rehearing *in banc* in this case. This Court should similarly deny review.

STATEMENT OF THE CASE

Armstrong accuses the court of appeals of basing its judgment on insufficient evidence, but then omits from its petition the most salient evidence on which the court relied. Armstrong's Statement of the Case also contains numerous errors and violates the elementary canon of appellate practice that the evidence is to be construed in the light most favorable to the party opposing judgment as a matter of law -- in this case, TINS. There has been no trial yet on TINS' Sherman Act § 1 claim, but there is a wealth of evidence in the case from which a jury could infer the existence of an illegal agreement between Armstrong and Stern according to which Stern would withdraw from TINS. Armstrong's suggestion that the judgment below rests on impermissible inferences is nonsense.

In brief, the facts are these:

(1) TINS was a highly effective means of enhancing the business of flooring distributors, run by Elliot Fineman, a national expert in the flooring industry. It was formed in 1983 as the subdivision of a very successful consulting company, Pet. App. 8A, and was hardly the fly-by-night operation that Armstrong implies. TINS enjoyed a positive cash flow at the time of its destruction by Armstrong. JA3240-43.

(2) Armstrong was the dominant supplier of resilient flooring in the United States. Pet. App. 7A-8A. It was 3.5 times larger than its nearest rival and 50% larger than its three principal competitors combined. JA1366, 7590. This was not due to Armstrong's efficiency but due to barriers to entry, including a system of captive distributors and relatively high fixed costs. Pet. App. 56A-60A; JA744, 1616, 3764, 7446. Armstrong exercised enormous market power over its distributors, and viewed the development of a dominant video network as critical, Pet. App. 53A-56A, and as the "Secret Weapon" and a "preemptive strike" in its plan to increase its dominance of the resilient market. JA1500-01, 7279, 7791, 7799. In the fall of 1983, however, Armstrong found itself three years behind TINS' competing video network, which was quickly enlisting many of Armstrong's own distributors. Pet. App. 9A-10A.

(3) Beginning in the fall of 1983 Armstrong actively discouraged all its distributors from enlisting with TINS. James Humphrey, general manager of the Armstrong Floor Division, sent a memo to all Armstrong district managers instructing them that "we feel this program conflicts with our future video plans and would not prove to be in our best interest." Pet. App. 11A. Robert Guzinsky, the Armstrong regional manager who oversaw Stern, parroted Humphrey's warning that "we feel this program conflicts with our mutual video plans and would not prove to be in our mutual best interest," Pet. App. 12A n.5, and added, "We are working constantly to develop logical video systems such as the program you will be showing shortly to your carpet Studios and feel we can satisfy both our needs in this area." *Id.* An Armstrong district manager wrote to marketing representatives:

> if you receive any inquiries regarding "TINS," please try to *discourage your wholesalers' participation* and offer suggestions on how their time could be directed towards a more important Armstrong sales effort. Additionally, please notify me as soon as the offer has been made to your wholesaler. *I want to make sure we all stay on top of this competitive effort.*

Pet. App. 13A n.6 (emphases added).

Armstrong's behavior in the fall of 1983 caused TINS to lose over $1.3 million in cash flow. JA1458. TINS threatened

Armstrong with an antitrust lawsuit, which culminated in a settlement agreement in which Armstrong paid TINS $42,000 and pledged to cease its interference with TINS' marketing of its video network. Pet. App. 13A-14A.

(4) In May 1984 Stern was in heavy financial trouble, was deeply in debt to Armstrong, and had compelling reasons to sign up with TINS, which it believed would greatly improve the company's fortunes. Pet. App. 79A.

(5) After taking prompt initial steps to implement the TINS program, Stern management suddenly and mysteriously stopped cooperating with TINS after the first week of June 1984. Despite the repeated urgings of TINS officials, Stern and its president, Alan Abrahamson, refused to take measures necessary to begin the program. Pet. App. 37A-38A. The record shows that Stern's change of mind came simultaneously with meetings between Stern and Armstrong officials at which TINS was discussed. Pet. App. 38A-39A.

(6) At a three-day training session on June 20-22, 1984, the Stern sales force exhibited an enthusiastic response to TINS. Pet. App. 40A-42A. Nonetheless, on June 22, 1984, Abrahamson told the TINS personnel, "to [their] complete surprise, that TINS was 'dead in the water'" and that Stern was withdrawing from the program. *Id.* at 42A. Abrahamson cited a host of reasons that were internally contradictory, completely contrary to the self-interest of the company, and ultimately unbelievable. As the TINS personnel satisfied each of Abrahamson's complaints and excuses, he invented another. A TINS official testified that he felt as if he had "entered the twilight zone" (JA2302) and that Abrahamson's supposed "reasons" were simply rationalizations for a predetermined course of action. JA2303.

(7) Fineman called Abrahamson at home the next day; and Abrahamson advised him that a principal reason for Stern's pulling out of TINS was leverage applied by Armstrong. Pet. App. 42A, JA1907-09, 1911-12.

(8) Stern's cancellation disrupted TINS' cashflow at a critical time when TINS was just beginning to recover from Armstrong's prior interference and led to TINS' financial ruin, as Armstrong knew it would. Pet. App. 15-16A, JA1764, 1773-75, 1781-82.

I. THE FIRST QUESTION IS NOT PROPERLY PRESENTED AND HAS NO MERIT

A. THE QUESTION IS BASED ON A DISTORTION THE RECORD

Armstrong seeks certiorari on the sufficiency of the evidence of TINS' Sherman Act § 1 claim, even though both courts below considered and rejected Armstrong's argument.[3] Armstrong's

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[3] The district court denied Armstrong's motion for summary judgment on sufficiency of the evidence, JA50, 54, and granted a directed verdict to Armstrong only on the basis of a radical and erroneous argument that Armstrong no longer defends. The district court ruled that, "[i]n this case, while it might be said that *there is a unanimity of purpose or common design and understanding to commit the tort of the disruption of the contractual relationship between Stern and TINS*, under no set of circumstances based on this record could the jury reasonably find that Stern shared Armstrong's purpose of eliminating TINS from competition in the video magazine market." JA 3680 (emphasis added). The district court acknowledged that the evidence indicated that "Armstrong and Stern were in *agreement*, that it was in Armstrong's best interest *and therefore in Stern's* to drop the TINS program." JA 3592 (emphasis added); *see also* A3700 (evidentiary ruling by district court that "there is sufficient evidence in the record of a conspiracy between Stern and Armstrong to abort the contractual relationship between Stern and TINS"). But the court rejected TINS' argument that the common purpose element of § 1 requires only that the conspirators "have a common purpose to engage in the acts alleged, not a common purpose of the ultimate goal." JA 3683.

The district court's holding that a distributor pressured into an agreement must be shown to have shared the manufacturer's underlying motive for engaging in the restraint of trade is utterly unprecedented and would eviscerate § 1 in the context of vertical agreements, because in almost every such case it is possible to define the interests of each party with sufficient specificity that they can be said to lack a "common motive." It can always be argued that a manufacturer is interested in eliminating a rival, whereas the captive distributor acts primarily in order to avoid punishment from its powerful patron. Thus, the court of appeals held, in a decision on which Armstrong does not seek this Court's review, that:

> the district court's novel approach is misplaced as it renders section 1 claims unavailable to private litigants suffering antitrust injury as a result of concerted action in a vertical matrix. Such a restrictive rule

attack on the court of appeals' opinion is completely unfair to the court and borders on outright misrepresentation.

1. The Court of Appeals Applied the Legal Test Sought By Armstrong

Armstrong's Petition for Certiorari makes it appear as if the Third Circuit simply flouted this Court's decisions in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The Petition asserts that the decision below stands in "sharp and unexplained conflict" with them. Pet. 8.

What Armstrong fails to mention is that the court of appeals discussed these cases *at length* and undeniably applied them to the facts of this case by requiring TINS to meet "a heightened evidentiary requirement" for its antitrust claim. Pet. App. 26A. The court held:

> In the antitrust arena, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita*, 475 U.S. at 588 (explaining the holding in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)). Where a defendant's allegedly illegal activity may stem from either procompetitive or anticompetitive objectives, inquiry must be made to determine whether a permissible inference can be drawn in favor of the plaintiff.

Pet. App. 26A; *see also id.* at 78A. Armstrong's disappointment with the manner in which the court of appeals diligently applied this legal standard to the particular facts of this case is hardly a cert-worthy matter.

> fails to recognize the difference between motive and objective and would dramatically alter the antitrust landscape in a manner unjustified by either precedent or policy considerations.

Pet. App. 78A-79A.

2. The Court of Appeals Did Not Base Its Decision on Isolated Fragments of Evidence, As Armstrong maintains

The gravamen of Armstrong's argument that the court of appeals misapplied the *Monsanto/Matsushita* standard is that it based its decision on impermissible inferences and isolated fragments of evidence -- on one comment by an Armstrong manager, according to the first question presented. Such a contention is an egregious distortion.

The question of whether Armstrong had coerced Stern to withdraw from TINS was common to both the tortious interference and § 1 issues before the court of appeals. Even Armstrong is forced to concede that the same corpus of evidence formed the primary foundation for both claims. Pet. 6 (claims were "all based on the same alleged conduct of Armstrong"); *id.* at 7 n. 6 ("the inferences ... were the same for both the tort and antitrust claims"). The court of appeals exhaustively canvassed the evidence in the case in the section of its opinion dealing with the tortious interference claim, *see* 35A-43A, 48A, and chose not to reprint that analysis under its antitrust analysis later in the opinion. The court explained:

> Armstrong primarily reiterates an insufficiency of the evidence challenge to TINS' theory of conspiracy. If this were borne out by the record, then Armstrong's evidence that Stern acted independently and in accordance with its own business interests would prevail to defeat any conspiracy motive or theory. However, for the reasons provided above in Part III, we reject Armstrong's formulation of the reasonable inferences that may be garnered from the trial record.

Pet. App. 79A n.30.

Armstrong quite misleadingly purports to summarize the court of appeals' analysis of the antitrust claim at pages 10-11 of the Petition ("The Third Circuit's reasoning is set forth below verbatim"). Yet Armstrong does not recognize, let alone confront, any of the discussion *earlier* in the court of appeals' opinion that makes clear the ample evidence supporting the § 1 antitrust claim. For example, the Petition ignores the long history of Armstrong's attempts to eliminate TINS as a viable business entity; Armstrong's perception

of TINS as a competitive threat; the settlement agreement between TINS and Armstrong; Armstrong's knowledge of TINS' precarious financial condition as a result of the settlement negotiations; and Armstrong's violation of the settlement agreement and its renewed determination to destroy TINS by coercing Stern to withdraw from TINS. Pet. App. 48A. Stern was the first distributor TINS attempted to sign up after entering into the settlement agreement. A1710-12.

Similarly, the Petition fails even to mention the plethora of evidence indicating that Stern withdrew from TINS only as a result of pressure from Armstrong. Indeed, Abrahamson told Fineman privately that pressure from Armstrong was a principal reason for Stern's withdrawal. Pet. App. 42A, JA1907-09, 1911-12. Stern was in severe financial trouble, was deeply indebted to Armstrong, Pet. App. 36A, and desperately needed the help TINS could provide. Pet. App. 79A n.30. Stern withdrew from TINS in highly suspicious circumstances: for two weeks it enthusiastically followed all of TINS' directives for implementing the TINS program, Pet. App. 36A-37A, then suddenly and inexplicably stopped doing so just as Stern and Armstrong officials held at least one meeting at the end of the first week of June 1984 at which they discussed Stern's recent sign-up with TINS. Pet. App. 38A-39A. On June 7, an Armstrong district manager told Stern's president, Alan Abrahamson, that TINS "didn't make a lot a sense" because there was an "overlap" between TINS and Armstrong's video network. Pet. App. 39A. Although Abrahamson and the district manager denied any further meetings, Abrahamson's calendar indicated that the two played golf on the following day. Pet. App. 39A. On June 12, James Humphrey, Armstrong general manager, sent a "confidential" memorandum (in violation of the settlement agreement), instructing Armstrong managers that "if any wholesalers request Armstrong's participation [in TINS], either on a local level or a national basis, you should inform them that we are unable to offer any *assistance*. You should make sure that your representatives are not involved in any sales presentations on this system or any other program not provided by Armstrong." Pet. App. 39A-40A (emphasis added). The evidence showed that the reference to "assistance" meant that Armstrong would cut off critical promotions to distributors that signed up with TINS. JA159, 2408-09, 2466, 6170.

In addition, at trial Abrahamson offered transparently pretextual and contradictory reasons for Stern's withdrawal. Pet. App. 43A. For example, Abrahamson claimed that his sales force had negative views about TINS and that he decided to defer to their judgment because he had never seen an edition of the TINS videotape. JA4491-92. Yet several sworn witnesses testified that Abrahamson had been shown a TINS videotape on June 5 and "reacted positively to it." Pet. App. 38A. At trial Abrahamson claimed that he had taken a vote of the members of his sales force, JA4317, but at his deposition five years earlier he had denied doing so. JA4362. In short, a jury could "infer that Abrahamson simply trumped up a number of excuses and attempted to distance himself from responsibility for the decision." Pet. App. 43A.

Thus, Armstrong is simply wrong when it claims that its liability rests solely on the "overlap" and "it doesn't make a lot of sense" remark to Stern's president. This comment cannot be viewed in isolation, for there was a whole pattern of evidence that placed the remark in context and revealed its menacing and coercive nature. The court of appeals found that it could be inferred "that Stern's financial fragility led Abrahamson to perceive a threat in Roth's remarks about TINS as an overlap program and that Stern's financial dependence on Armstrong made Stern particularly susceptible to coercion." Pet. App. 42A-43A. The court of appeals reaffirmed the district court's finding that "Armstrong and Stern were in *agreement*, that it was in Armstrong's best interest *and therefore in Stern's* to drop the TINS program." JA3592 (emphasis added); *see also* A3700 (evidentiary ruling by district court that "there is sufficient evidence in the record of a conspiracy between Stern and Armstrong to abort the contractual relationship between Stern and TINS"). It was a tribute to Armstrong's absolute power over Stern that Armstrong officials did not need to say much in order to make themselves understood.[4]

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[4] In addition, although the court of appeals did not need to reach this question, the key fact is that Armstrong admitted that its officials talked about TINS with Stern's president at a critical time, just prior to Stern's withdrawal. Armstrong's claims about what was said are unimportant. Indeed, a jury would be free to disbelieve the testimony of Armstrong's district manager that he limited his comments to the "overlap" and it

The court of appeals concluded that, "[a]lthough Armstrong vigorously contested the existence of, or permissible interpretation of, each of these alleged facts, because we may not tread on the jury's credibility determination function, we must presume in reviewing this directed verdict that the jury would believe TINS' factual contentions." Pet. App. 79A n.30. The district court explained with respect to the § 1 claim that "questions of credibility which can only be resolved by the trier of fact permeate this record." A36. The court of appeals and the district court were right to leave the matter to a jury, and this Court should deny review.

3. Armstrong's Claims of Error Are Patently Unfounded

The mandate of *Monsanto* and *Matsushita* was clearly met in this case. There was ample evidence to exclude the possibility that Stern and Armstrong acted independently; there was ample proof that they had a common design and understanding that Stern should withdraw from TINS because such action was in Armstrong's interest; and there was ample evidence that such an objective was unlawful and, furthermore, that it led to TINS' demise.

Armstrong's attempt to caricature the court of appeals' reasoning by assigning deceptive labels to the court's analysis does not advance its cause. Armstrong insists on a showing of "coercion" or "threat" even though the court of appeals made precisely such findings and even though this Court's precedents do not require a showing of "coercion" or "threat" in order to prove "agreement" even in the vertical context. Armstrong also criticizes the "appeasement theory" (Pet. 13), but this analysis was simply the court of appeals' recognition that the inference that Stern withdrew from

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"doesn't make a lot of sense" remarks. A jury could credit the entry in Abrahamson's calendar that indicated that he played golf with the district manager on the following day, Pet. App. 39A, and could draw further inferences from the suspicious denials of Abrahamson and the district manager regarding the golf date. In sum, a jury could infer from Stern's behavior, Abrahamson's comment to Fineman, and the other circumstantial evidence in the case that Armstrong officials used much more direct language with Abrahamson.

TINS because of pressure from Armstrong was strengthened by the evidence that "Stern acted against its economic interest in reneging on distributing TINS." Pet. App. 83A n.32.

Next, Armstrong contends that there was no explicit "acquiescence" by Stern in the agreement that Stern would withdraw from TINS. Pet. 13. Yet such acquiescence was powerfully and unmistakably communicated by Stern's *action* in withdrawing from TINS. The point of the "acquiescence" requirement is to ensure that there is an actual "meeting of the minds" or "common scheme," *Monsanto*, 465 U.S. at 764 n.9; it does not mean that an explicit verbal utterance is necessary to prove a violation of § 1. This Court has long held that "business behavior is admissible circumstantial evidence from which the fact finder may infer agreement." *Theatre Enterprise, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540 (1954); *see also Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939). The inference of agreement was especially strong in this case: Abrahamson told Fineman privately that he had acted as a result of pressure from Armstrong; Stern's action in withdrawing from TINS was economically irrational from Stern's perspective; and Stern's public excuses for its actions were utterly and transparently pretextual.

Finally, Armstrong attacks what it calls the court of appeals' "vicarious knowledge theory," (Pet. 14), without explaining the relevance of its attack to the court's decision. The court of appeals held that a jury could infer "that Abrahamson recognized a conflict between Armstrong's and TINS' videotapes and recognized Armstrong's anticompetitive goal" and that "a rational factfinder could draw the inference that Armstrong wanted to eliminate TINS from the video market so that Armstrong would not have to compete with TINS, and that Stern knowingly aided in that effort." Pet. App. 81A. Thus, there was a "meeting of the minds" and "conscious commitment to a common scheme" regardless of what Armstrong calls the "vicarious knowledge theory."[5]

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[5] In any event, by its "vicarious knowledge" theory, the court of appeals quite unremarkably meant that Stern was "chargeable with knowledge" of the probable effect of its actions. Pet. App. 82A. Vicarious knowledge was unnecessary, since Fineman told Abrahamson directly, before Stern's withdrawal became final, that the pullout would

Armstrong asks, "What should Armstrong and other manufacturers do to avoid future lawsuits like this one?" Pet. 15. They can simply refrain from violating the antitrust laws. Barring that evidently unthinkable course, they can honor settlement agreements rather than violating them; avoid mounting sustained and coordinated campaigns to destroy competitors by wrongful means; avoid a paper trail of incriminating documents; refrain from pressuring captive distributors to withdraw from beneficial contracts with competitors; or avoid any of the other myriad acts that led to the overwhelming mosaic of evidence against Armstrong here.

B. THE QUESTION HAS NO MERIT

Armstrong's petition rests on the assumption that *Monsanto* and *Matsushita* create a special heightened evidentiary standard in antitrust cases involving vertical restraints. There are two related flaws in Armstrong's theory.

First, Armstrong ignores this Court's decision last Term in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S. Ct. 2072 (1992), where this Court explained that "*Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision." *Id.* at 2083. Notably, in the discussion of its first question presented Armstrong does not even *cite*, let alone attempt to distinguish, *Eastman Kodak*. That decision makes clear that Armstrong's arguments here are unfounded. *Matsushita* does not create some sort of fuzzy "heightened evidentiary standard" but merely recognizes that, "[i]f the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted." 112 S. Ct. at 2083; *see also id.* at 2083 n.14 (describing *Monsanto* as holding that "to survive summary judgment there must be evidence that 'reasonably tends to prove' plaintiff's theory").[6]

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harm TINS. JA4513.

[6] Out of an abundance of caution, the court of appeals applied the heightened evidentiary standard advocated by Armstrong and assumed *arguendo* that it was not foreclosed by *Eastman Kodak*. *See* Pet. App. 27A.

Plainly, TINS' claims here are not "economically senseless." Armstrong had a powerful motive for destroying TINS, its video competitor, and thereby gaining dominance in what Armstrong viewed as a critical market. Pet. App. 53A-56A. Armstrong planned to launch its own video network -- which it termed its "Secret Weapon" and "preemptive strike" in its plan to increase its dominance of the resilient market, JA1500-01, 7279, 7791, 7799 -- but was three years behind TINS. Pet. App. 10A. In fact, as envisioned by its ten-year plan, Armstrong did increase its resilient market share to unprecedented levels after it destroyed TINS. JA1471, 1502, 7590, 7709.

Second, as Armstrong's motives to destroy TINS indicate, this is not a vertical case, but rather one with a distinct horizontal flavor. Unlike *Monsanto*, this case does not involve a terminated distributor who relies on complaints from competing dealers in order to prove the existence of an agreement between those dealers and the manufacturer. Because a manufacturer who terminates a successful dealer is not acting in its own rational interest, it is likely that the dealer has in fact been terminated for a legitimate reason and is using antitrust law as an excuse. But the logic behind *Monsanto's* holding that "something more than evidence of complaints is needed" to prove the existence of a conspiracy under § 1 in dealer termination cases, 465 U.S. at 764, is simply irrelevant here. Armstrong was not terminating a successful dealer but targeting a rival for elimination. This conduct, while socially undesirable, was financially rational from Armstrong's perspective. Stern, on the other hand, had strong reasons to remain affiliated with TINS. Stern's withdrawal was "against its economic interest," Pet. App. 83A n.32, and the evidence in this case indicated that it was caused by pressure from Armstrong. There is no danger here that an agreement would be "inferred merely from the existence of complaints," *Monsanto*, 465 U.S. at 763 -- there *were* no dealer complaints -- or from other kinds of "highly ambiguous evidence." *Ibid.*

No lower court decision cited by Armstrong is apposite here, for all of them involve terminated dealers in the resale price maintenance context, or other fact patterns lacking the horizontal component present in this case. This demonstrates not only that the question presented is without merit, but also that the factual features

of this case are sufficiently unique that it lacks precedential significance and does not merit this Court's review.

II. THE SECOND QUESTION RESTS ON A DISTORTION OF THE DECISION BELOW AND HAS NO MERIT

Armstrong maintains that the court of appeals used an improper "functional equivalence" test to reach the incorrect conclusion that TINS and the Armstrong video network were in competition. Armstrong's argument is wrong.

First, it is wildly inaccurate to say that the court of appeals applied a "functional equivalence" test. Armstrong quite incredibly ignores the court of appeals' formal articulation of the standard of review, in which the court of appeals outlined at substantial length the very "reasonable interchangeability" test that Armstrong accuses the court of rejecting! The court of appeals explained:

> We recently had occasion to set forth the legal contours of a relevant product market in *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715 (3d Cir. 1991), *cert. denied,* 60 U.S.L.W. 3871 (June 30, 1992). For brevity's sake, we reiterate that definition here:
>
> The relevant product market is defined as those "commodities reasonably interchangeable by consumers for the same purposes." *United States v. E.I. Du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956); *SmithKline Corp. v. Eli Lilly & Co.*, 575 F. 2d 1056, 1062-63 (3d Cir.), *cert. denied,* 439 U.S. 838 (1978). Factors to be considered include price, use and qualities. *Du Pont de Nemours*, 351 U.S. at 404. Accordingly, the products in a relevant product market would be characterized by a cross-elasticity of demand, in other words, the rise in the price of a good within a relevant product market would tend to create a greater demand for other like goods in that market. *Id.* at 380, 400.

Pet. App. 51A. Moreover, the court of appeals explicitly applied the "reasonable interchangeability" test throughout its product market analysis, *see, e.g.*, Pet. App. 52A, 55A n.20, 56A, and held that:

> the record supports the jury's inference that retailers [the buyers of the respective video programs] may have perceived TINS' and Armstrong's video programs to be interchangeable. Both offered product information, sales training and techniques, and interviews with industry experts. Although Armstrong presented evidence of differences between the two video programs, the jury was free to disbelieve Armstrong's evidence.

Pet. App. 56A. Armstrong may disagree with the court's application of the "reasonable interchangeability" test, but it is astonishing for Armstrong to claim that the court did not apply the correct standard.[7]

Second, the evidence in this case, construed in TINS' favor, amply supported the court of appeals' conclusion that the two video networks were reasonably interchangeable from the standpoint of the floor covering retailers who purchased the tapes. Armstrong ignores a wealth of evidence that its video network for floor covering retailers was in "[e]xactly ... the same market" as TINS, JA1639, and was "competitive" with TINS, Pet. App. 13A n.6, because the programs "overlap[ped]." JA3021. As one Armstrong witness admitted, "[t]hey were essentially both retailer training programs, training retailers to be better merchants, to do a better sales job, and so forth." JA3040. The tapes, another Armstrong witness conceded, "were more than selling aids." JA4834. Armstrong used its distributors to supply its tapes to the same retailers targeted by TINS,[8] and, according to a 10-year plan, in 1984 Armstrong was on the verge of a massive expansion of its network to make it even more like TINS in format and content. JA1900, 7320-21, 7223, 7278-79, 7280, 7286, 7591. The district

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[7] Armstrong relies exclusively on a single, off-hand reference by the court of appeals, which noted in passing that one witness had said that the two video networks were "functionally equivalent." Pet. App. 55A. By using this phrase to describe trial testimony, the court of appeals was not adopting it as a legal test, and it is absurd for Armstrong to suggest otherwise.

[8] *See* JA1627-33, 1638-45, 1843-48, 1898-1900, 2430-31, 2529, 3833, 4778, 4886, 5270, 6132-33, 6139-41, 7288-90, 7316-22, 7351-56, 7358-59.

court held, JA206 n.32, 3615-16, 6718 -- and Armstrong did not dispute on appeal -- that Armstrong's planned expansion had to be considered in determining the relevant product market. Armstrong's claim that it provided its tapes to retailers on a "non-profit" basis, Pet. 17, is unsupported by the record, which reveals both that Armstrong earned a direct profit on the tapes, JA4826-27, and that it used them to increase its market share of the resilient flooring market. JA1500-01, 7279, 7791, 7797. The district court held that the jury, on this "uniquely factual" issue, "could rationally and reasonably find sufficient similarity between TINS' and Armstrong's video products to determine that a market for video magazines for floor covering retailers exists, occupied at one time by TINS and Armstrong and now by Armstrong only." JA192. There is no need for this Court to review this intensely factual issue.

III. THE THIRD QUESTION WAS NOT RAISED BELOW AND HAS NO MERIT

The court of appeals did not need to consider the unreasonableness of the restraint of trade represented by the Stern-Armstrong agreement because Armstrong did not *raise the issue before the court of appeals*. The district court had granted Armstrong a directed verdict on a legally flawed theory. *See* n.3, *supra*. In the court of appeals, Armstrong defended that decision on the alternative ground that *Monsanto* precluded the inference of conspiracy, but it never claimed that the district court's decision could be defended on the ground that, as a matter of law, the restraint was a "reasonable" one. That is why the court of appeals stated that the question of whether the restraint was reasonable did not "concern[] us here." Pet. App. 78A. For the Court's convenience, we attach as Appendix A hereto the entirety of Armstrong's appellee's brief dealing with the § 1 issue. The cases are legion, of course, that this Court ordinarily does not consider questions not raised below. *See, e.g., Sisson v. Ruby*, 110 S. Ct. 2892, 2894 n.1 (1990); *Heckler v. Campbell*, 461 U.S, 458, 468-469 n.12 (1983).

Furthermore, the question presented has no merit. Armstrong attempts to manufacture a circuit conflict by mischaracterizing the nature of TINS' § 1 claim. This is not a case merely of "vertical foreclosure" where a manufacturer denies a competitor access to its customers. Pet. 22-23. Here, Armstrong, upon learning about

TINS, embarked on a deliberate campaign to destroy its only competitor and, after weakening TINS financially through its pre-settlement interference, JA1686-89, 1698, 1707-08, applied the *coup de grace* by pressuring Stern -- who was the first distributor enrolled by TINS after the settlement agreement was signed and was critical to TINS' continued survival -- to withdraw from TINS. JA1697-98, 1775-78, 2544, 2548, 2553-57, 2848-64, 3542-43. TINS' cashflow was stretched to the limit, and it could not have signed up a new distributor to replace Stern.[9] JA1777-79, 1677, 2554. To construct its "circuit conflict," Armstrong omits entirely any mention of the court of appeals' finding that:

> Aware of TINS' precarious financial position from Fineman's disclosure during the 1983 settlement negotiations, Armstrong recognized its opportunity to disrupt TINS' recovering, or to eliminate TINS entirely by destroying TINS' agreement with Stern. Armstrong accomplished this by wielding both the general authority it exercised over its captive distributors and by applying more specific coercive pressure, available because of Stern's precarious financial position. ... [T]he jury could have found that despite a settlement agreement, Armstrong flagrantly disregarded its continuing obligations under the settlement agreement and deliberately reactivated its plan to clear out any competition for its future video network plans.

Pet. App. 48A. None of the cases on which Armstrong relies (Pet. 23) is apposite.

The "market reality" (Pet. 23) is that "Armstrong wanted to eliminate TINS from the video market so that Armstrong would not have to compete with TINS," Pet. App. 81A; that "the agreement between Armstrong and Stern [was] central to the demise of TINS,"

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[9] In addition, from TINS' perspective, the number of salespersons that a distributor had was crucial, since more salespersons meant that a distributor could sell more subscriptions to the TINS network. "Because Armstrong distributors typically employ more salespersons than distributors of other floor covering products, TINS especially targeted them as its distributors." Pet. App. 9A. For TINS, signing up Armstrong distributors was "critical." *Id.*

id.; that, after it destroyed TINS, Armstrong's share of the resilient market rose to unprecedented levels, JA1471, 1502, 7590, 7709; and that Armstrong's goal in eliminating its rival in the video market was an "anticompetitive" one. Pet. App. 81A; *see also id.* at 84A (holding that Armstrong and Stern "share[d] a commitment to a common scheme which has an *anticompetitive* objective") (emphasis added). TINS suffered antitrust injury because its injury stemmed from that which made Armstrong's conduct illegal.[10]

CONCLUSION

The Petition for Certiorari is completely without merit and rests on egregious distortions of the record and of the decision below. It should be denied.

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[10] The court of appeals concluded that "[t]he evidence falls short of demonstrating that Armstrong has at any time since 1984 captured monopoly power, or a dangerous probability of it, in the video market." Pet. App. 62A. But this surely does not mean that the restraint of trade represented by the Stern-Armstrong agreement was "reasonable" *as a matter of law*. A company can have *market* power and a restraint of trade can be unreasonable even if the company does not enjoy a *monopoly*. Armstrong's assumption that a restraint of trade does not violate § 1 if it does not lead to a monopoly (Pet. 22) erroneously equates the standards of § 1 and § 2 of the Sherman Act.

In any event, the "market reality" is that no new video network has arisen to compete with Armstrong. JA1860-63, 2127, 2212, 2909, 4891. Although when TINS was destroyed two former TINS distributors threw together a few videotapes in order to complete their customers' subscription periods so they would not have to refund any money, Pet. App. 61A, these efforts were simply productions of tapes and were not viable video networks (which include marketing, distribution, programming, supplying equipment, and other full-service features). Moreover, they did not convey the same type of information as TINS, and they ceased when the subscription periods ended. JA4227-28, 4262-63, 4861-63, 4891. Constructing a new network from scratch would be a formidable task, and no one has attempted it.

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APPENDIX

BRIEF FOR DEFENDANT-APPELLEE ARMSTRONG
in No. 91-5613 (3d Cir.), filed Dec. 23, 1991,
PART VI(F):

F. The District Court Correctly Dismissed Plaintiffs' Antitrust "Conspiracy" Claims Because There Was No Shared Anticompetitive Motive

The District Court dismissed all of plaintiffs' antitrust "conspiracy" claims under Sherman Act §§ 1 and 2 because "under no set of circumstances based on this record could the jury reasonably find that Stern shared Armstrong's [alleged] purpose of eliminating TINS from competition in the video magazine market." A3680. Plaintiffs argue that the District Court's ruling was erroneous on the theory that Armstrong "coerced" Stern's cancellation of the Letter of Intent, which plaintiffs assert was a legally recognized "coerced" conspiracy. Plaintiffs' argument is flawed both on the facts and the law.

The evidence consists only of (1) Roth's "doesn't make a lot of sense" comment; (2) Humphrey's internal memo advising that Armstrong could not provide any participation/assistance "in the [TINS] system"; and (3) the circumstantial evidence of Stern's June 5-20 conduct, which was a rational response to a business situation. Such evidence fails to establish any coerced conspiracy because it does not "conclusively exclude the possibility" that Stern acted independently in cancelling the Letter of Intent, *Link*, 788 F.2d at 923; *Monsanto*, 465 U.S. at 764, especially in light of the unequivocal testimony of the Stern witnesses (A4318-19, 5028, 5292) that their decision was independent.

Plaintiffs argue that the District Court erred in concluding that an antitrust conspiracy requires a common anticompetitive motive of the alleged conspirators. Br. 55. To the contrary, the lower court relied on *Columbia Metal Culvert Co. v. Kaiser Alum. & Chem. Corp.*, 579 F.2d 20, 36 (3d Cir.) *cert. denied*, 439 U.S. 876 (1978), which found no antitrust conspiracy because the evidence did not establish that the alleged co-conspirator "consciously shared" defendant's anticompetitive

purposes "to eliminate" a competitor. Third Circuit law has long required that proof of an antitrust conspiracy must include "satisfactory demonstration of a motive to enter an agreement" reflecting the conspiracy. *Venzie Corp. v. United States Mineral Prods. Co., Inc.*, 521 F.2d 1309. 1314 (3d Cir. 1975); accord *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 286-87 (1968).

Plaintiffs' evidence does not even rise to the level of being ambiguous on the conspiracy issue. But even if it were, "antitrust law limits the range of permissible inferences from ambiguous evidence", and if the alleged wrongful "conduct is consistent with other, equally plausible explanations," the claim should be dismissed. *Matsushita*, 475 U.S. at 588, 596-97.

neither the pleadings nor the pre-trial statement even hinted that TINS intended to pursue a "pure" non-leveraging section 2 claims. In its pre-trial statement, TINS explicitly spelled out its theory that Armstrong leveraged monopoly power in the resilient product market to dominate the video magazine market:

> Armstrong used its dominance in the resilient floor covering market to drive TINS out of business in the retail floor covering video programming market by intimidating a number of independent firms, floor covering distributors, not to do business with plaintiffs, and with regard to a number of distributors, to back out of letters of intent that they had entered into with TINS.

J.A. at 717-18. Moreover, TINS identified only a single legal issue pertaining to its section 2 claims in the pre-trial statement:

> A firm that uses its dominance in one market (here the resilient floor covering market) to destroy competition in another market (here, the video programming for retail floor covering establishments sub-markets) violates the Sherman Act. *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

J.A. at 780. The district court did not abuse its discretion in limiting TINS's section 2 claim to its leveraging theory.

Three subsidiary elements are common to both TINS' monopoly and attempted monopoly claims: (1) a relevant product market consisting of resilient flooring; (2) a relevant product market limited to TINS' and Armstrong's videotapes; and (3) Armstrong's possession of monopoly power in the resilient flooring product market. We take up each of these elements in turn. The parties have stipulated to a relevant geographic market encompassing the United States. J.A. at 652.

1. *Relevant Product Market*

We recently had occasion to set forth the legal contours of a relevant product market in *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715 (3d Cir. 1991), *cert. denied*, 60 U.S.L.W. 3871 (June 30, 1992). For brevity's sake, we reiterate that definition here:

> The relevant product market is defined as those "commodities reasonably interchangeable by consumers for the same purposes." *United States v. E.I. Du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956); *SmithKline Corp. v. Eli Lilly & Co.*, 575 F. 2d 1056, 1062-63 (3d Cir.), *cert. denied*, 439 U.S. 838 (1978). Factors to be considered include price, use and qualities. *Du Pont de Nemours*, 351 U.S. at 404. Accordingly, the products in a relevant product market would be characterized by a cross-elasticity of demand, in other words, the rise in the price of a good within a relevant product market would tend to create a greater demand for other like goods in that market. *Id.* at 380, 400.

Id. at 722 (parallel citations omitted). Moreover, relevant product submarkets may also exist. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). These may be evidenced by "such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id.* With this standard in mind, we turn to the evidence.

a. resilient

As the district court recognized when it left undisturbed the jury's finding of a resilient-only floor covering market, the determination of a relevant product market or

submarket ("market") is a highly factual one best allocated to the trier of fact. *See Weiss v. York Hospital*, 745 F.2d 786, 825 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985) (determination of the relevant product market is a question of fact). In light of the judgment n.o.v., we review the evidence pertinent to a relevant product market in the light most favorable to TINS, examining whether TINS has produced sufficient evidence that resilient floor covering is not "reasonably interchangeable [with other floor coverings] by consumers for the same purposes." *Id.*

TINS produced clearly sufficient evidence to support the jury's implicit finding that resilient and carpet are, by and large, not considered reasonably interchangeable by consumers. J.A. at 1570-73; 2826. For the most part, residential consumers desire carpeting in bedrooms and resilient in kitchens and baths. Although some areas of the home are subject to interchange-ability, e.g., family rooms and entryways, the differing characteristics of the two floor coverings as they pertain to comfort and maintenance dictate their location in any particular home. *See* The Carpet and Rug Institute, *Economy of Carpet*, J.A. at 8293-94 (describing the lower operating and maintenance costs associated with carpet as opposed to resilient and other hard surface floor coverings). This differentiation is substantiated by evidence that pricing of carpet and of resilient is independent of each other. *See*, *e.g.*, J.A. at 3115 (Pomianoski: Congoleum, another resilient manufacturer, does not take into account carpet prices); J.A. at 2877 (Lerman, a carpet distributor, does not consider resilient prices when pricing carpet; he looks to carpet's competition and profitability). Finally, there was evidence of industry recognition of differences between carpet and resilient and vendor specialization. *See*, *e.g.*, J.A. at 5089 (Crockett, a former Armstrong distributor, testified that the resilient and carpet markets are separate; resilient requires technical installation expertise unlike carpet).

Armstrong contends that even given differences between resilient and carpet, a "soft" floor covering, there simply is no resilient-only relevant product market because

resilient competes with all other hard surface floor coverings.[18] The strongest evidence of a resilient-only product market comes in the form of an Armstrong manual that touts the unique cushioning and spring-back characteristics of resilient as opposed to all other hard surface floor coverings. J.A. at 7784-87. Although less distinct than the preferences governing carpet versus resilient, according to the testimony of David Kolb, president of a carpet distributor, consumer trends generally govern the location of a given floor covering within residences, although there does exist an insignificant amount of crossover due to unusual consumer preference. J.A. at 2193-98; *see also* J.A. at 5957-58 (Armstrong's expert witness, Edwin DePodwin); *cf. Tunis Bros.*, 952 F.2d at 724-26 (plaintiffs' witnesses universally testified to the interchangeability between Ford and other comparably prices tractors). Kolb further testified to industry recognition of the differences in hard surface floorings, opining that floor coverings constitute different product lines that require different marketing strategies. J.A. at 2194.

We conclude that this admittedly mixed record does support the jury's finding of a resilient-only product market.

b. video

Likewise, the record is sufficient to support the jury's finding that the relevant video market or submarket consisted of TINS' video magazine and Armstrong's video selling aids.[19] Armstrong's overall video plans encompassed a ten-year plan to develop a video network, according to Fineman, beginning with Armstrong's distributors in 1983, target its retailers by 1986, and eventually reach consumers through the Fashion Floor Center program. J.A. at 1813; 1846;

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[18] If this proposition were true, Armstrong's possession of a 21% market share in hard surface floor covering products would, as a matter of law, defeat TINS' section 2 claims. J.A. at 5956. *See Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 489 (5th Cir. 1984).

[19] In so finding, we have combed the substantial trial transcript and concluded that it supports the jury's verdict in this respect. Thus we have not needed to view the actual videotapes and video disks supplied by the parties.

1899-1900; 1924-25. Fineman opined that Armstrong's video network for retailers was only in the planning stages in the fall of 1983 when TINS was launched and lagged three years behind TINS. J.A. at 1899-1900. In order to draw comparisons between the two networks, we will briefly detail Armstrong's video program.

Armstrong announced its first formal videotape program, entitled the "Take Charge" series, in December of 1981. J.A. at 4735. *See, e.g.*, J.A. at 8033; 4735-38. According to the manager of Armstrong's Bureau of Training and Development, Thomas Downey, Armstrong developed the Take Charge series as a training aid to train expeditiously many new Armstrong distributors who were added in response to Armstrong's loss of a large distributor.

Subsequently, in May of 1982, Armstrong announced "The Next Step," a distributor video communication network, with a threefold purpose: 1) to increase the effectiveness of training programs for both distributors and retailers; 2) to improve their ability to market new products and promotions; and 3) to provide an additional communication link within Armstrong's distribution system. J.A. at 7278-79. This program required distributor investment in an industrial grade of Sony betamax equipment capable of "interactive/interruptive" viewing; this system enabled viewers to select from multiple choice options and provided for varying screen responses depending upon the viewer's choice. *Id.*

Armstrong also developed its Fashion Floor Center (FFC) program, which was in place by 1984 and was then available to interested retailers for an investment of $4,000. J.A. at 4452. In exchange for this fee, an FFC participating retailer would receive state of the art product displays, exclusive "high-end" products, management guides and sales training. J.A. at 4450-52. Eventually, the FFC program also included a videodisc kiosk installation for use by consumers to acquaint them with detailed knowledge about Armstrong products and their maintenance. J.A. at 4780. By the time of the trial, the initial FFC fee equalled $8,000. J.A. at 4452.

Armstrong contends that its video network and the TINS magazine do not alone constitute a relevant video product market, primarily because Armstrong's videos were not in magazine form, but were videotaped selling aids indistinguishable from a host of other manufacturers' and commercial selling aid materials. Moreover, Armstrong distinguishes its video program, allegedly tailored toward its distributors, from the TINS magazine, tailored for all retailers. Last, Armstrong posits that its videos were limited in subject matter to Armstrong products and information about Armstrong product features, installation, and general selling techniques whereas the TINS magazine provided a comprehensive survey of the floor covering industry with information about divers and competitive products.[20]

Fineman testified, however, that video magazines targeted at floor covering retailers differed from video magazines produced for other audiences. J.A. at 1962. Moreover, he opined that, with the sole exception that Armstrong's video exclusively focused upon Armstrong products, Armstrong's and TINS' video network were functionally equivalent. J.A. at 1644. Both video programs provided product information and sales techniques. *Id.*

The plaintiffs also refute Armstrong's suggestion that its videos were provided to distributors, explaining that consistent with its entire product distribution scheme, Armstrong channeled sales to retailers through its distributors. Armstrong's Draeger concurred, testifying, "our wholesalers were showing video to retailers." J.A. at 6132; *see also* J.A. at 6140 (the Armstrong video network was designed largely for distributors with portions to be shown to retailers); J.A. at 4886 (Funsten testified that Armstrong made videos available for retailers in

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[20] At trial, Armstrong advanced the theory that its video network did not differ from selling aids provided in different media forms. TINS produced sufficient evidence from which the jury may have reasonably concluded that the video medium was not reasonably interchangeable with print. *See, e.g.*, J.A. at 1633 (Fineman testified that a picture is worth a thousand words); 2917 (Al Wahmon, publisher of *Floor Covering News*, explained that print magazines were "faster breaking" than video magazines).

1983-84); J.A. at 7358-59 (Armstrong memorandum outlining the functions of the FFC program). Draeger even admitted that Armstrong's video would be sold through distributors to retailers. J.A. at 6141.

Thus, the record supports the jury's inference that retailers may have perceived TINS' and Armstrong's video programs to be interchangeable. Both offered product information, sales training and techniques, and interviews with industry experts. Although Armstrong presented evidence of differences between the two video programs, the jury was free to disbelieve Armstrong's evidence.

2. *Monopoly Power in the Resilient Market*

Central to TINS' leveraging theory is the predicate fact of Armstrong's monopoly power in the resilient market. Monopoly power has been defined as "the power to control prices or exclude competition and may ordinarily be inferred from a predominant share of the relevant market." *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956); *see American Tobacco*, 328 U.S. at 797. A predominant share of the market, or a lesser market share combined with other relevant factors, may suffice to demonstrate monopoly power. *Weiss*, 745 F.2d at 827 n.72. Armstrong's market share, if sufficiently high, may obviate the need to analyze other pertinent factors. Thus, our starting point must be to determine Armstrong's market share of the resilient product market. *See Pennsylvania Dental Ass'n v. Medical Serv. Ass'n of PA*, 745 F.2d 248, 260 (3d Cir. 1984) (". . . the size of market share is a primary determinant of whether monopoly power exists"), *cert. denied*, 471 U.S. 1016 (1985).

Although estimates of Armstrong's market share of the resilient market differed widely, taking the evidence in the light most favorable to TINS, the jury could have credited Armstrong with as high a share as 55 percent of the resilient market. J.A. at 2904 (Albert Wahnon, the publisher of industry magazine Floor Covering News, placed Armstrong's market share as high as 55%); *see also* J.A. at 2629 (Fineman testifying that Armstrong possessed over 50% of the resilient market); J.A. at 3330 (Robert Starke, a former Congoleum employee,

placed Armstrong's market share at 50%); J.A. at 1470 (giving Armstrong "dominant market share for sheet goods of 45-50%"). We must determine whether a 55 percent market share, combined with other factors, suffices for monopoly power.

As a matter of law, absent other relevant factors, a 55 percent market share will not prove the existence of monopoly power. *See Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 489 (5th Cir. 1984) (referring to Judge Learned Hand's formulation that 90% is enough, 60% is not likely to suffice, and 33% is insufficient to constitute monopoly power) (citation omitted). A significantly larger market share than 55 percent has been required to demonstrate *prima facie* monopoly power. *See American Tobacco*, 328 U.S. at 797 ("over two-thirds of the entire domestic field of cigarettes, and . . . over 80% of the field of comparable cigarettes" constituted "a substantial monopoly"); *Grinnell*, 384 U.S. at 571 (87%); *International Boxing Club v. United States*, 358 U.S. 242 (1959) (81%); *see also Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S.Ct. 2072, 2090 (1992) (100% and 80% to 95% of the relevant markets survives summary judgment).

Reazin v. Blue Cross and Blue Shield, Inc., 899 F.2d 951 (10th Cir.), *cert. denied*, 110 S.Ct. 3241 (1990), upon which TINS relies, does not advance its argument. *Reazin* concerned Blue Cross' decision to terminate its contracting provider agreement with a hospital that had contracted with a competitive insurer, effectively increasing patient costs at the terminated hospital. In *Reazin* the court suggested that given Blue Cross's relative dominance of a 47-62 percent market share as compared to a market share of less than 5 percent for its nearest competitor and given jury findings of actual anticompetitive restraint of trade, a finding of market power may be unnecessary. *Id.* at 968 n.24, 969 (citing *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986)). *Indiana Fed'n of Dentists* posits two situations in which market power may not need to be demonstrated in order to prove monopoly power: 1) a naked restriction on price or output without a competitive justification; or 2) "proof of actual detrimental effects." *Id.* at

460-61. Neither is implicated in this case, and TINS does not contend otherwise.

Other factors relevant to determining whether Armstrong exercised monopoly power, or "the power to control prices or exclude competition" in the resilient market, include:

> the size and strength of competing firms, freedom of entry into the field, pricing trends and practices in the industry, ability of consumers to substitute comparable goods o[r] services from outside the market, and consumer demand factors. A defendant's power either by itself or aided by these other factors must be enough to restrict entry, supply, or price. *See* L. Sullivan, *Handbook of the Law of Antitrust* §§ 22-32 (1977); *see also* Dolan & Ralston, *supra* note 4, at 767.

Weiss, 745 F.2d at 827 n.72. An evaluation of the evidence pertaining to these other factors is necessary in order to determine whether Armstrong wielded power to control prices or to exclude competition in the resilient market.

TINS produced persuasive evidence in the form of a market share analysis compiled by an Armstrong competitor, Mannington Mills, that Armstrong's market power in 1984 far exceeded that of its nearest three rivals. According to this report, Armstrong then possessed 48% of the resilient market share. J.A. at 7590. Its closest competitors were Congoleum with a market share of 15.2%, Tarkett with 7.8%, and Mannington Mills with 10.9%, respectively; all other competitors shared the remaining 18.1% share of the market. Thus Armstrong's market share exceeded even the combined market share of its three closest competitors and equalled over three times the market share of its nearest competitor. Armstrong, as well as a financial analyst, have described it as the "dominant" manufacturer in the resilient industry. *See, e.g.*, J.A. at 7284-85; 7368. This "dominance" is reflected in Armstrong's superior brand recognition. *See* J.A. at 7368; 1622.

In addition to Armstrong's impressive market share, TINS presented evidence of significant barriers to entry in the resilient industry. A 1984 United States International Trade Commission report on the domestic sheet vinyl flooring industry[21] spelled out several key barriers to entry. *See* J.A. at 7444-50. First, the Commission reported that

> "[p]roducers in the United States and Canada rely primarily on single-supplier distributors (captive suppliers) to sell the major portion of their production. Even without patent protection, this distribution systems [sic] renders quick penetration of the market impossible without purchasing an existing distribution network.

J.A. at 7446. Although Swedish and West German firms have overcome this barrier to enter the United States market, the options for competing in the United States are limited to buying an established distribution network, to developing a new distribution network, or to selling to retail outlets directly at a discounted price for the do-it-yourself market. Buying established networks is difficult because few are available; building one is "a slower method that does not allow an immediate challenge to U.S. producers across the breadth of the market," J.A. at 745;, directing sales to the do-it-yourself market offers limited market penetration because of this group's small size and preference for vinyl tile, rather than vinyl sheeting that is typically sold in 12 foot rolls. *Id.*

Transportation costs, the primary nonproduction cost factor, constitute another formidable barrier to entry by foreign firms, "resulting in an almost universal advantage to the closest . . . producer." J.A. at 7446. The USITC adds, however, that these costs primarily serve to reduce foreign competitors and that

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[21] The resilient industry referred to in this opinion encompasses both sheeting and tile forms of vinyl floor coverings.

> [t]ransportation costs pose an approximately equal disadvantage for U.S. and Canadian producers in most of North America. Also, transportation costs is less a factor in competition between imports from Asia and the domestic product on the west coast, because the ocean freight costs for the imports roughly equal the inland transportation costs from domestic factories on the east coast.

J.A. at 7446.

Assuming arguendo that the record might support an inference of monopoly power in the resilient market we find that TINS has not, however, proven a section 2 leverage claim, because, as we discuss below, (1) there is no evidence of a use of monopoly power in the video market and (2) a showing of an attempt to gain competitive advantage in the video market is insufficient as a matter of law.

B. *Leveraging*

TINS' leveraging claim cannot survive its failure to prove that Armstrong was able to convert power in the resilient market into either a monopoly or a dangerous probability of monopoly in the video market. Moreover, we hold as a matter of law that TINS may not advance a leveraging claim under section 2 premised upon Armstrong's having attained a mere competitive advantage in the relevant video market.

1. *Monopoly Power in The Video Market*

As our starting point, we recognize that TINS need only to have proven the requisite assertion of power in the video market from 1984 through the time of the trial. We agree with the district court that to restrict the time period to 1984 would arbitrarily insulate from antitrust liability a defendant who may have acted prospectively to eliminate a competitor and who may have harbored future plans to overtake a relevant product market. Thus we have combed the extensive trial record in

search of evidence that Armstrong has at any time since 1984 achieved either a monopoly, or dangerous probability of one, in the video market.

Moreover, we also accept the implicit finding of the jury that both TINS' and Armstrong's videos were targeted to floor covering retailers. Because retailers carry various product lines and typically do business with several competing distributors, one cannot characterize the retailer market by extrapolating from data concerning distributors. We reject the district court's conclusion that because Armstrong distributors constituted 15.5 percent of all floor covering distributors or at most 34 percent of the top 50 floor covering distributors, then TINS failed, as a matter of law, to prove a large enough market share in the video market. Rather, the evidence suggests that a 15 to 34 percent share of distributors could have reached a larger portion of retailers, especially given evidence that Armstrong distributors typically deploy larger sales forces than other resilient manufacturers.

Having thus far speculated, we are left without record support to discern precisely how extensively Armstrong has penetrated the video market for retailers. TINS merely explains that Armstrong targeted all retailers and that no replacement video magazine for TINS has emerged. There is no evidence to show how many retailers Armstrong has actually brought into its video network, or, alternatively, how many retailers sell Armstrong products and thus would be viable prospects to join Armstrong's video network.

Moreover, even if Armstrong remains the only supplier in the relevant video market, the record clearly proves that barriers to entry in the video market are extremely low. In fact, upon TINS' demise, two Armstrong distributors produced their own substitute video magazine to satisfy their retailers' full year subscription. J.A. at 4227. They funnelled relatively little capital into the venture and needed minimal start-up time. *See* J.A. at 4227-29. Fineman's own plans to create a video network for the sports industry, as well as his contemplation of developing similar technology in additional markets, demonstrate the fallacy of Fineman's testimony that expertise in the particular industry constituted a barrier to entry; even if legally

tenable, Fineman conceded he lacked any expertise in the sporting goods industry, thus factually defeating this contention. J.A. at 1800-01; *see* J.A. at 8408 (reserving contract rights with RCA to obtain discounted video equipment for ventures in the sporting goods, liquor, apparel and beauty aides industries).[22] The evidence falls short of demonstrating that Armstrong has at any time since 1984 captured monopoly power, or a dangerous probability of it, in the video market.

2. *Competitive Advantage in the Video Market*

TINS alternatively posits that a monopoly leveraging case may be proved by showing only a "competitive advantage" in the secondary market. Thus, assuming *arguendo* that it has proven that Armstrong flexed monopoly power over resilient, TINS suggests that it may prevail upon its section 2 claim even in the absence of proof that Armstrong acquired anything more than a "competitive advantage" in the video market. TINS derives this theory from *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), in which the court of appeals stated that "the use of monopoly power attained in one market to gain a competitive advantage in another is a violation of section 2, even if there has not been an attempt to monopolize the second market." Although monopoly leveraging claims are not entirely foreign to us, *see Danny Kresky Enterprises, Corp. v. Magid*, 716 F.2d 206 (3d Cir. 1983); *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1065 (3d Cir.), *cert. denied*, 439 U.S. 838 (1978), we have not previously considered the viability of

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[22] TINS alluded to evidence that Hal Clark's supermarket industry video magazine start-up costs of $1.5 million proved a formidable barrier to entry. By Clark's own testimony, however, his "Supermarket Insights" differed significantly from TINS or Armstrong's videos. Clark's was gratuitously provided to a limited number of top industry executives and financed through paid advertising. TINS' revenue came from entirely different sources, *i.e.*, subscribers, and its target audience was widely-based.

Berkey Photo's holding; we are now asked to do just that.[23] *Berkey Photo* has not been widely approved and has been adopted only by the Court of Appeals for the Sixth Circuit. *See Kerasotes Michigan Theaters, Inc. v. National Amusements, Inc.*, 854 F.2d 135 (6th Cir. 1988) (adopting *Berkey Photo*'s leverage theory in reversing the dismissal of a complaint for failure to state a claim).

In *Berkey Photo*, the plaintiff alleged that the defendant, Kodak, had leveraged its monopoly power in the camera and film markets to obtain a "competitive advantage" in the photofinishing equipment and services markets, which Kodak concededly did not pose any danger of monopolizing. 603 F.2d at 275. Monopoly power is tolerated under antitrust law only to the extent that it provides competitive incentives to a firm innocently possessing such power. Moreover, because it did not perceive any reason to distinguish between the destruction and the distortion of competition in the leveraged market, the court held that Kodak could be liable even if it exercised less than monopoly power, or even a dangerous probability of monopoly, in the downstream photofinishing market. *Id.* "[A] firm violates section 2 by using its monopoly power in one market to gain a competitive advantage in another, albeit without an attempt to monopolize the second market." *Id.*

Rather than focusing upon broad premises of antitrust law, we begin with the text of the Sherman Act.[24] Two important distinctions between section 1 and section 2 of the Sherman Act surface upon examination of the language.

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[23] *Danny Kresky* involved the use of monopoly leveraging in one city to exclude a competitor from promoting concerts in another. *SmithKline* involved monopoly leveraging over sales of antibiotics to set prices in the cephalosporin drug market for cephalosporin drugs at a level at which competitors in the leveraged market could not compete. Because the plaintiffs had proven conduct traditionally proscribed by the Sherman Act, neither case implicated the issue with which we are faced.

[24] Section 1 proclaims that "[e]very contract, combination . . ., or conspiracy, in restraint of trade . . . is . . . illegal." Section 2 declares as illegal "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize . . . ." 15 U.S.C.A. §§ 1, 2 (West Supp. 1992).

Section 1 prohibits "restraints of trade" accomplished by means of concerted action; section 2 prohibits more severe monopoly and attempted monopoly resulting from unilateral action. As these distinctions make clear, the Sherman Act does not make unlawful the entire universe of anti-competitive conduct. It does not prescribe anti-competitive unilateral conduct that falls shy of threatened monopolization.

This was succinctly set forth by the Supreme Court in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), in which the Court held that a wholly-owned subsidiary and its parent corporation could not engage in concerted action in violation of section 1 as a matter of law:

> It cannot be denied that section 1's focus on concerted behavior leaves a "gap" in the Act's prescription against unreasonable restraints of trade. An unreasonable restraint of trade may be effected not only by two independent firms acting in concert; a single firm may restrain trade to precisely the same extent if it alone possesses the combined market power of those same two firms. *Because the Sherman Act does not prohibit unreasonable restraints of trade as such* -- but only restrains effected by a contract, combination, or conspiracy -- *it leaves untouched a single firm's anti-competitive conduct (short of threatened monopolization)* that may be indistinguishable in economic effect from the conduct of two firms subject to section 1 liability . . . .

Id. at 774. *Berkey Photo*'s formulation of monopoly leveraging to proscribe unilateral restraints of trade does violence to the text of the Sherman Act and decimates this "gap" in liability.

For its holding, the court in *Berkey Photo* relied upon dicta in *United States v. Griffith*, 334 U.S. 100 (1948). In *Griffith*, the Court broadly stated that ". . . the use of monopoly

power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful." In *Griffith*, a monopoly leveraging case, the Court considered whether concerted action by several movie theater operators, who owned the only theaters in numerous "closed towns," to enter into annual "master agreements" with movie distributors that resulted in restricting the number of films available to competing movie theaters in neighboring "open towns" constituted violations of sections 1 and 2 of the Sherman Act. *Griffith*, 334 U.S. at 102-03. The district court had granted summary judgment for the defendants because it believed that the evidence did not demonstrate a conspiracy in restraint of trade. Finding a pooling of buying power with anti-competitive effects, the Court reversed the district court, explaining that "even if we accept the District Court's findings that appellees had no intent or purpose unreasonably to restrain trade or to monopolize, we are left with the question whether a necessary and direct result of the master agreements was the restraining or monopolizing of trade within the meaning of the Sherman Act." *Id.* at 106. On remand, the district court was instructed to determine the effect of these practices, a conclusion it had not reached given its previous holding. *Griffith* did not reach the question of whether the several movie theater operators had leveraged their power in one market in order to gain a simple competitive advantage in another. Nor did *Griffith* determine whether that action would be unlawful. Thus, *Griffith*'s broad statement, upon which *Berkey Photo* relied, should not control this case. This is especially true since, in contrast to the court in *Berkey Photo*, we have the benefit of *Copperweld*'s explication of the Sherman Act's purposeful "gap" in liability.

The Court of Appeals for the Ninth Circuit has, likewise, expressly declined to follow *Berkey Photo*. *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 1603 (1992). In rejecting *Berkey Photo*'s monopoly leveraging theory, the court gave weight to *Copperweld*'s distinction between section 1 and section 2 claims, concluding that *Berkey Photo*'s theory derived from a misapplication of the elements of a section 2 claim.

In concert with the Court of Appeals for the Ninth Circuit, we hold that in order to prevail upon a theory of monopoly leveraging, a plaintiff must prove threatened or actual monopoly in the leveraged market. We therefore reject TINS' proposition that it needed to prove only a competitive advantage in the relevant video market.

V. *New Trial*

Having concluded that the district court's grant of judgment n.o.v. must be reversed in part, we now consider the district court's conditional grant of a new trial on the Sherman Act section 2 claim and the tortious interference claims.[25] *See* Fed. R. Civ. P. 50(c)(1). The district court granted a new trial on two grounds: (1) the verdict was against the weight of the evidence, and (2) improper conduct by plaintiffs' trial counsel so pervaded the trial as to infect the jury's verdict. We review each of these rulings for an abuse of discretion. We discuss them in reverse order.

A. *Conduct of Counsel*

The district court granted a conditional motion for a new trial premised upon its finding of improper conduct by plaintiffs' counsel during summation. In short, the district court found that the tenor of the summation was such that a strong probability existed that the verdict had been influenced by the improper conduct. In its judgment, the cautionary instructions given to the jury proved to be insufficient to immunize the jury from the improper and inflammatory remarks of plaintiffs' counsel. *Fineman*, 774 F. Supp. at 269. In brief, the district court concluded that, among other infractions which do not bear repeating here, *see Fineman*, 774 F. Supp. at 274-75, plaintiffs' trial counsel had improperly testified to his own truthfulness and trustworthiness, supplied "facts" not in evidence about the credibility of Armstrong witnesses, accused Armstrong's

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[25] We note that because of our disposition of the Sherman Act section 2 claim on appeal, *see supra* Part IV, a new trial on remand would not include a section 2 claim. A new trial would, however, include a Sherman Act section 1 claim and a contract claim, discussed *infra* Part VI.

witnesses of being "liars" and "perjurers," and levied "an unadorned, disparaging attack" upon defense counsel throughout his summation. *Fineman*, 774 F. Supp. at 270-72. This basis for a new trial has been adequately preserved.[26]

Our standard of review with respect to the award of a new trial for prejudicial conduct by counsel is deferential. "We recognize that the trial judge has considerable discretion in determining whether conduct by counsel is so prejudicial as to require a new trial." *Draper v. Airco, Inc.*, 580 F.2d 91, 94 (3d Cir. 1978) (citations omitted). Because the trial judge was present and able to judge the impact of counsel's remarks, we defer to his assessment of the prejudicial impact. As we stated in *Reed v. Philadelphia, Bethlehem & New England R.R. Co.*, 939 F.2d 128 (3d Cir. 1991), "[i]n matters of trial procedure such as that involved here, the trial judge is entrusted with wide discretion because he is in a far better position than we to appraise the effect of the improper argument of counsel." *Reed*, 939 F.2d at 133. Thus we will defer to the district court's judgment that its curative instructions during the summation were insufficient to expunge the prejudicial impact of plaintiffs' trial counsel's closing remarks. J.A. at 6988.

In order for us to evaluate the plaintiffs' trial counsel's summation in context, a brief review of Armstrong's counsel's summation is useful. Armstrong had counterclaimed against TINS and Fineman, alleging a civil conspiracy to bring this lawsuit, and requesting as damages legal fees amounting to $1.1 million. In commencing his closing argument, Armstrong's counsel characterized Armstrong as the true victim

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[26] Armstrong objected to plaintiffs' trial counsel's improper remarks by filing a motion *in limine* to limit his closing argument, moving for a restraining order, placing several objections on the record during his summation and moving for a mistrial following summation. J.A. at 6988; 7154; 7158-59; 7206. Although Armstrong's counsel did not object to each potentially improper remark, the district court concluded that it had adequately preserved its objections. J.A. at 229. The district court did not abuse its discretion in ruling that Armstrong was not required to object to each and every objectionable remark because requiring such action would have unnecessarily created even more prejudice to Armstrong in the eyes of the jury.

in this case, stating: "Armstrong is a million dollar victim because we did nothing wrong," and characterizing the case as a "financial million dollar nightmare for Armstrong." J.A. at 6884; 6880. Subsequently, he uttered "I believe . . .", inviting a mild correction from the district court. J.A. at 6891. The balance of his summation focused upon the credibility of witnesses; he accused Fineman of lying and urged the jury to disbelieve the plaintiffs' theory of plot and conspiracy and to credit Armstrong's witnesses. J.A. at 6977; 6971-83. With this background laid, we turn to evaluate plaintiffs' trial counsel's remarks to the jury in light of our jurisprudence.

At the outset, we recognize that not all improper remarks will engender sufficient prejudice to mandate the granting of a new trial. Our test is whether the improper assertions have made it "reasonably probable" that the verdict was influenced by prejudicial statements. *Draper*, 580 F.2d at 97. Often, as in the seminal case of *Draper*, a combination of improper remarks are required to persuade us of prejudicial impact. There we held that the combination of the following improprieties by plaintiff's counsel constituted grounds for a new trial:

> 1) he attempted to prejudice the jurors through repeated inappropriate references to the defendants' wealth; 2) he asserted his personal opinion of the justness of his client's cause; 3) he prejudicially referred to facts not in evidence; and 4) without provocation or basis in fact, he made several prejudicial, vituperative and insulting references to opposing counsel.

580 F.2d at 95; *cf. Salas v. Wang*, 846 F.2d 897 (3d Cir. 1988) (an isolated improper remark will not support the grant of a new trial); *Anastasio v. Schering Corp.*, 838 F.2d 701 (3d Cir. 1988) (same). Despite a curative instruction, which came a day after the offending summation, we concluded in *Draper* that "it was more than 'reasonably probable' that the verdict was influenced by the prejudicial statements." *Id.* at 97. This conclusion was compelled by the argument as a whole rather than a single instance or type of impropriety. *Id.*

In addition to our caselaw, the district court applied New Jersey Rule of Professional Conduct 3.4(e) which prescribes "Fairness to Opposing Party and Counsel" by prohibiting certain conduct:

> A lawyer shall not: . . . (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

Rule of Professional Conduct 3.4(e); D.N.J. R. 6. As will be demonstrated, upon this record, we cannot second guess the district court's judgment that plaintiffs' trial counsel ran afoul of both the rule and our jurisprudence.

Plaintiffs' trial counsel commenced his summation on the day following Armstrong's counsel's summation:

> One thing [defense counsel] and I agree on, probably the only thing, is that credibility will decide this case, who's telling the truth.
>
> If you believe [defense counsel's] telling the truth, then the plaintiff's [sic] don't deserve a penny.
>
> If you believe we're telling the truth then I will show that the evidence justifies an award . . .
>
> How are you going to determine who's telling the truth? Well, *it seems to me that you have to start with lawyers because let's face it, [defense counsel] made a couple of very direct statements*

> *yesterday. You have to judge whether he was being truthful to you or whether he wasn't.*
>
> Now, last night I counted up, in going through his statements that he wanted you to believe, over 24 misrepresentations and I have backed them up with fact.

J.A. at 6987-88 (emphasis added). He expounded upon the first of his 24 "misrepresentations"[27] at which point defense counsel

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[27] These "misrepresentations" consisted of Armstrong's version of disputed material facts. A demonstrative aid shown to the jury listed "[Defense Counsel's] Significant Misrepresentations In Summation." J.A. at 1296-1303. These "misrepresentations" attributed to Armstrong and "facts" attributed to plaintiffs merely consisted of two versions of disputed factual issues. A brief excerpt demonstrates:

MISREPRESENTATION	*FACTS*
12. Donofrio said that there was a continuing problem with the quality of the June issue in the eyes of the Stern's sales staff.	12. By end of the day Friday the sales staff was fully in favor of going forward.
14. Sterns was scheduled to go out on Monday after the sales training.	14. Sterns admits that no advance appointments were made.
15. Parties do not compete.	15. Armstrong's own documents show that they viewed TINS as competitor.
18. Armstrong has never sold a single subscription to Armstrong's Video Network.	18. Floor Fashion Center sells for $8,000 to buy in and ongoing $1,000 per year includes Armstrong Video Network.
22. TINS and Armstrong were not competitors.	22. Armstrong's own documents reveal that Armstrong considered

objected and the district court cautioned the jury that "the lawyers in the case are not witnesses. The credibility of the lawyers is not an issue in this case as opposed to the credibility of the witnesses." J.A. at 6987-88.

In the course of describing the 24 misrepresentations that the defense counsel allegedly made, which served as plaintiffs' trial counsel's outlining theme, plaintiffs' counsel suggested that defense counsel either forgot or deliberately misrepresented the evidence. *See, e.g.*, J.A. at 6993 ("[Defense counsel] got up here with a straight face and he said that to you, hoping that you would believe him"). Plaintiffs' trial counsel also provided the jury with a possible motive for defense counsel's alleged misrepresentations -- $1.1 million in legal fees, J.A. at 6993, and hammered home this theme repeatedly:

> Well, [defense counsel] has earned his million dollars, I couldn't do it, I really couldn't.

TINS to be a prime competitor.

See, for example, Csnrko 10/25/83 memo ("competitive effort").

See Guzinsky 9/25/83 memo ("TINS conflicts with future video plans").

See Roth testimony ("considered TINS to 'overlap' with Armstrong Video Network").

24. Contends Armstrong's market share is only 25-30%.

24. Mannington chart shows Armstrong market share as 49%.

J.A. at 1296-1303.

J.A. at 7024.

> [Defense counsel] has earned his million dollars. I give it to him. He has earned it. He has earned his million dollars. Let it not be said that he did not earn it."

J.A. at 7059.

> . . . and this poor [defense counsel], I hope he's already gotten his million dollars, I hope the check has already been deposited.

J.A. at 7062.

It has long been a rule of this court that vituperative references to opposing counsel will not be tolerated. In *Draper*, 580 F.2d at 91, we so held in a case that involved plaintiff's counsel's repeated characterization of defense counsel and defendants collectively as "his" or "this" "gang," "charge[ing]" defense counsel "as part of the same conspiracy," and implying that defendants and their counsel had withheld documents: "every time we get to a crucial spot, things disappear." *Id.* at 96. These repeated assertions in combination with other improprieties made it "reasonably probable" that the verdict was influenced by the prejudicial statements. *Id.* at 96-97. The improprieties apparent on the cold appellate record in *Draper* were sufficiently egregious to require reversal of the district court's denial of a new trial even under our deferential standard of review. The district court's assessment that plaintiffs' trial counsel exceeded the bounds of propriety established in *Draper* falls with its sound exercise of discretion.

Furthermore, the district court found that plaintiffs' trial counsel also improperly provided his personal opinion as to the justness of his cause and injected his own credibility as an issue in the case:

> I have a certain calmness about me today because of you, that is because I trust you. I have come to know you over

> almost three months and I think I know what type of people you are and I know, I don't think, I don't hope, but I just know that you're going to do the right thing.
>
> * * *
>
> I could show you all the documents . . . [o]r, I said to myself, hopefully, by now after three months you trust me enough that if I tell you something that I've not lied to you yet, that I'm not about to start now. And I thought I could shorten it up a great deal on the hope that you will trust me, . . . you will trust me enough that I will be straight with you. . . . that's one of the reasons why yesterday I spent a lot of time on the credibility of the people who were talking up here, myself and [defense counsel].

J.A. at 7085-87; *see also* J.A. at 7097. He also pledged his own truthfulness:

> I mean, after all, as the Judge told you and the Judge is absolutely right, it's not just so much the truthfulness of the lawyers, although I might remind you, if I may, that when I got up here a few months ago, *I told you I would never lie to you. [Defense counsel] couldn't point out a single misrepresentation that I made to you over the three months because I didn't make one. That's not how I try cases.*

J.A. at 7015 (emphasis added). And further:

> I said to you [at the onset of the trial], I make a pledge that I will not lie to you

> and I will prove everything on this [demonstrative aid] board.

J.A. at 7148.

Plaintiffs' trial counsel's comments were not limited to Armstrong's counsel. When arguing the relative credibility of the witnesses, he repeatedly made a number of impassioned remarks. He spoke in terms of "the nerve," J.A. at 7034; 7040; 7044; 7050; 7058, of Armstrong witnesses to lie on the stand or perjure themselves "with a straight face," J.A at 7037; 7040, opining that he couldn't say it "with a straight face"; "in front of a federal judge and a federal jury," J.A. at 7034; 7038; 7050; 7058; 7139. He argued that the testimony of Armstrong's witnesses and its theory of the case was simply "insulting" to the intelligence of the jury, J.A. at 7039; 7047; 7048; 7057, and opined that Armstrong witnesses must have mistaken the jurors for people "just off the boat". J.A. at 7050.[28] Although we recognize that "advocacy" need not "be devoid of passion," in context we are satisfied that the district court did not err in ruling that these remarks crossed the line dividing line proper from improper conduct. *See Draper*, 580 F.2d at 95.

The plaintiffs assert that their trial counsel's summation in this regard was no stronger than that warranted by

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[28] One quote neatly capsulizes plaintiffs' trial counsel's summation in these respects. After recreating a question put to Armstrong witness Dennis Draeger concerning whether Roth's comments to Abrahamson "[weren't] just a blatant, blatant, blatant disregard of what you were supposed to do?", he argued,

> And God bless him, please, in front of a federal judge and I ask him that question. He's in front of a federal jury and he's got the nerve to say, no, it's not inconsistent.
>
> God bless him. He's got a lot of nerve. Can you imagine he's looking you in the eye?
>
> I mean, does he think you just got off the boat? Who does he think he is? Really. That is insulting.

J.A. at 7050.

the evidence of conspiracy between Armstrong's witnesses and counsel. They suggest that *Anastasio*, 838 F.2d at 701, stands for the proposition that a new trial is not warranted on the basis of counsel's questioning the credibility of a witness. In striking contrast to this case, however, our holding in *Anastasio* rested upon the fact that the trial counsel's improper statement was an isolated one in an otherwise proper summation. *Id.* at 706. This fact, combined with the district court's curative instruction to the jury that the statements of counsel are not evidence, was sufficient to ensure that no prejudicial impact had occurred. *Id.*; *see also Salas*, 846 F.2d at 907-910 (one impassioned comment in a highly emotionally charged trial was insufficient to prejudicially affect the defendant's substantial rights).

The district court also found that plaintiffs' trial counsel had made statements that arguably referred to extrinsic evidence. *Fineman*, 774 F. Supp. at 270. For example, he stated: "I have more on Mr. Draeger, but I won't bore you with it. I hope by now you trust me that there's plenty more in here, but I'm not going to bore you with it." J.A. at 7051; *see also* J.A. at 7097. Although the plaintiffs contend that the statement was made in the context of summarizing the evidence and that plaintiffs' trial counsel was referring to record evidence, the district court found without elaborating that counsel had relied on facts outside the record. *Fineman*, 774 F. Supp. at 270. As we made clear in *Ayoub v. Spencer*, argument injecting prejudicial extraneous evidence constitutes reversible error. 550 F.2d 164 (3d Cir.), *cert. denied*, 432 U.S. 907 (1977).[29]

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[29] In *Ayoub*, a personal injury case, we considered defense counsel's representation that the plaintiff's testimony was inconsistent with his medical history as contained in two sets of hospital records. One set of records was not submitted into evidence, although a doctor testified that in practice a medical history was based upon the patient's description. Thus, the effect of counsel's remark was to insinuate that Ayoub had given inconsistent statements about his medical condition. We ruled that "[r]eversible error is committed when counsel's closing argument to the jury introduces extraneous matter which has a reasonable probability of influencing the verdict." *Id.* at 170; *see also Draper*, 580 F.2d at 96 (in a wrongful death action, it was improper for plaintiff's counsel to speak of meeting with the decedent's children, who did not testify, and use that as an improper springboard to speculate as to the decedent's motivation for attempting the dangerous, and

B. *Weight of the Evidence*

With respect to the court's ruling that the verdict was against the weight of the evidence, we caution that the district court ought only to grant a new trial on this basis where "a miscarriage of justice would result if the verdict were to stand." *Williamson v. Consolidated Rail Corp.*, 926 F.2d 1344, 1352 (3d Cir. 1991). This limit upon the district court's power to grant a new trial seeks to ensure that a district court does not substitute its "judgment of the facts and the credibility of the witnesses for that of the jury." *Lind v. Schenley Indus. Inc.*, 278 F.2d 79, 90 (3d Cir.) (*in banc*), *cert. denied*, 364 U.S. 835 (1960). "Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of facts. It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than is the case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial." *Id.*

Nevertheless, reversal of a judgment n.o.v. upon a finding of sufficient evidence to support the jury's verdict does not preclude affirmance of a new trial order arising from the conclusion that the verdict is against the weight of the evidence. *See, e.g.*, *Roebuck v. Drexel University*, 852 F.2d 715, 735 (3d Cir. 1988); *American Bearing Co. v. Litton Indus.*, 729 F.2d 943, 948 n.11 (3d Cir.), *cert. denied*, 469 U.S. 854 (1984). In *Roebuck*, we mandated just such a result, acknowledging that the evidence permitted a number of inferences which supported the plaintiff's cause of action but also recognizing that the weight of the evidence fell the other way. The comment we made in this regard is equally applicable here:

> We must also acknowledge the extraordinary number of inferences that the jury must have drawn in order to

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ultimately fatal, job). Even the district court's instruction, that the jury would have to "recall the testimony about [the missing set of hospital records]" did not suffice to cure the prejudice. *Ayoub*, 550 F.2d at 170 & n.10.

> reach the verdict that it did. Although we believe that each of the inferences that we have discussed are individually logically sound, we recognize that at some point too many inferences become mere speculation; this verdict plainly comes very close to that line.

Roebuck, 852 F.2d at 736. When reviewed as a whole, even in the light most favorable to the nonmoving party, the record in this case as well allows for the inferences on which the plaintiffs rest their case. Nonetheless, we cannot find that the district court abused its discretion in concluding that the verdict was clearly against the weight of the evidence in view of the inferences the jury must have made despite contrary direct evidence, and especially in view of the district court's finding that plaintiffs' trial counsel advanced prejudicially improper arguments to the jury throughout the trial, culminating in a particularly offensive summation.

Given the wealth of questionable remarks made by plaintiffs' trial counsel and the highly inferential case, we are clearly convinced that the district court did not abuse its discretion in awarding Armstrong a new trial.

VI. *Directed Verdict and Summary Judgment Order*

Because we will remand this case to the district court for a new trial on TINS' tortious interference claim, we now address two other dispositive orders of the district court: the directed verdict on TINS' section 1 claim and the summary judgment on its breach of contract claim.

A. *TINS' Sherman Act Section 1 Claim*

Section 1 of the Sherman Act prohibits "[e]very contract, combination . . ., or conspiracy in restraint of trade or [interstate] commerce. . . " 15 U.S.C. §1 (1982). A judicial gloss of reasonableness has been cast over section 1; to be actionable, a restraint of trade must be unreasonable. *See Business Electronics*, 485 U.S. at 723. A section 1 claim thus requires proof of two elements: concerted action and an

unreasonable restraint of trade. Only the first element concerns us here.

We have variously formulated the meeting of minds requisite to an antitrust conspiracy.

> The propriety of the directed verdict thus turns on whether, with regard to [Armstrong and Stern], ". . . the circumstances are such as to warrant [the trier of fact] in finding that the [alleged] conspirators had a unity of purpose or a common design and understanding or a meeting of minds in an unlawful arrangement.

Columbia Metal Culvert Co. v. Kaiser Aluminum & Chem. Corp., 579 F.2d 20, 33 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978) (citations omitted). We have described the concerted action element of a section 1 claim as requiring proof of a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Edward J. Sweeney*, 637 F.2d at 111. TINS has here alleged that Armstrong and Stern conspired to destroy TINS' competitive threat to Armstrong in the relevant video market.

At the close of the plaintiffs' case, the district court orally granted a directed verdict to Armstrong on TINS' section 1 claim, determining that "under no set of circumstances based on this record could the jury reasonably find that Stern shared Armstrong's purpose of eliminating TINS from competition in the video magazine market." J.A. at 3680. In so ruling, the district court rejected TINS' proposition that section 1 co-conspirators are held liable for their joint commitment to an unlawful purpose whether or not their motives for making that commitment are different. We conclude that the district court's novel approach is misplaced as it renders section 1 claims unavailable to private litigants suffering antitrust injury as a result of concerted action in a vertical matrix. Such a restrictive rule fails to recognize the difference between motive and objective and would dramatically alter the antitrust landscape in a manner unjustified by either precedent or policy

considerations. As we set forth in *Edward J. Sweeney*, 637 F.2d at 111, the emphasis is upon the participant's "*commitment to [the] scheme* [which is] designed to achieve an unlawful purpose" (emphasis added) which is crucial. A rational factfinder could infer agreement with the objective from knowledge of the objective and action calculated to achieve the objective despite differing motives.

At the outset, it is critical to recognize that the conspirators *sub judice* are vertically aligned; their conspiracy consists of pressure brought by a manufacturer upon its distributor to aid it in driving a competitor out of business. In a typical vertical context, an alleged competitor to the manufacturer will not be perceived in the same light by the manufacturer's downstream distributor. Rather, any interest that a distributor might harbor in eliminating this competitor from the market would be derivative of its manufacturer. As demonstrated by this case, TINS did not pose a direct competitive threat to Stern; Stern lacked any independent motive to drive TINS from the relevant video market. Because Stern relied upon sales of Armstrong products for 90 percent of its gross revenues, however, it would naturally perceive that that which is in Armstrong's interest also inures to Stern's benefit. Stern's only possible motivation for destroying TINS would necessarily be derivative of Armstrong's desire to eliminate its competition. In this factual finding upon the record evidence, the district court was not clearly erroneous.[30]

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[30] Armstrong primarily reiterates an insufficiency of the evidence challenge to TINS' theory of conspiracy. If this were borne out by the record, then Armstrong's evidence that Stern acted independently and in accordance with its own business interests would prevail to defeat any conspiracy motive or theory. However, for the reasons provided above in Part III, we reject Armstrong's formulation of the reasonable inferences that may be garnered from the trial record.

TINS' proposition that distributing the TINS magazine would have been highly profitable to Stern by enabling Stern to supplement its income with subscription royalties is amply supported in the record as is the inference of motivation on Stern's part to enter the conspiracy, namely, Stern's heavy reliance upon Armstrong as the supplier of 90% of its product. In addition, TINS produced evidence to show that Stern was not achieving a desired level of profitability and Armstrong had encumbered Stern with inventory liens.

The parties have not suggested nor have we been able to find any authority for the proposition that vertically aligned co-conspirators must share an identical anticompetitive motive. Moreover, we cannot conceive of a situation in which vertically aligned co-conspirators seeking to destroy a competitor of only one could ever satisfy this requirement. We note that the Supreme Court has not carved out from section 1 liability a conspiracy to destroy a competitor by two firms at different levels of distribution. Although the Court has had more occasions to address *per se* price-fixing illegality in a section 1 context, *see, e.g., Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (a vertical maximum price-fixing scheme is *per se* unlawful under section 1); *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339 (1990) (same but requiring that plaintiff demonstrate antitrust injury to prevail); the same principle applies to vertical section 1 claims grounded in non-price restraints. *See, e.g., Business Electronics*, 485 U.S. at 724 (recognizing the viability of section 1 claims for vertical nonprice restraints under a rule of reason test).

Likewise, we have not required previously an exact sharing of the anticompetitive motive for concerted action. *Harold Friedman, Inc. v. Thorofare Markets, Inc.*, 587 F.2d 127, 143 n.64 (3d Cir. 1978) ("Although there is no direct evidence that Union shared Thorofare's motive of eliminating a competitor, Union cannot automatically be absolved from liability on this ground, particularly since it might well have known of Thorofare's purpose and 'materially aided in the accomplishment of [its] plan'"). In *Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068 (3d Cir. 1978), we explained in some detail the contours of the factors provided by the Supreme Court in *Albrecht*, a vertical price-fixing case, for determining concerted action:

> First, both Milne and Kroner knew that the Herald's purpose was to assure its

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Although Armstrong vigorously contested the existence of, or permissible interpretation of, each of these alleged facts, because we may not tread on the jury's credibility determination function, we must presume in reviewing this directed verdict that the jury would believe TINS' factual contentions.

> fixed price for the retail sale of the papers. Therefore, knowledge of the defendant's purpose to restrain trade is an important factor. Secondly, at least two members of the combination stood to benefit by the restraint of trade, the Herald by assuring the price it desired and Kroner by getting a profitable paper route. Thus, in a sense, two members of the combination shared a common purpose insofar as they both benefitted from the restraint of trade.
>
> A final important factor in *Albrecht* is that the agreement with Kroner was in no sense collateral to the purpose to restrain trade but went to the heart of the restraint.

Harold Friedman v. Kroger, 581 F.2d at 1073.

Viewing the facts in the light most favorable to the plaintiffs as non-moving parties, we find that these factors were established in this case. Although the inference is broad, Roth's "overlap" statement, *see supra* at 45,[31] could have been understood to demonstrate that Abrahamson recognized a conflict between Armstrong's and TINS' videotapes and recognized Armstrong's anticompetitive goal. Second, Armstrong clearly benefitted from eliminating TINS' competition in the video market and Stern benefitted from appeasing the supplier upon whom it was so dependent. Third, given the evidence that Armstrong executives knew of TINS' precarious financial position, the agreement between Armstrong and Stern would have been central to the demise of TINS. Thus we conclude that a rational factfinder could draw the inference that Armstrong wanted to eliminate TINS from the video market so that Armstrong would not have to compete with TINS, and that Stern knowingly aided in that effort, albeit from somewhat

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[31] Roth had testified that he perceived TINS would "overlap" with Armstrong's video program and "probably" had counseled Abrahamson that distributing TINS would not make "a lot of sense."

different motives. It is not likely that Stern believed that it was the only distributor Armstrong did not wish TINS to deal with; and a jury could find that Stern is chargeable with knowledge that if Armstrong succeeded, TINS would indeed be eliminated as a competitor in that market.

The district court erroneously relied upon *Columbia Metal Culvert* to hold that antitrust co-conspirators must share a common anticompetitive motive. *Columbia Metal Culvert*, in which a distributor brought suit under sections 1 and 2 of the Sherman Act against its former suppliers and one of its former employees for conspiring to destroy its business, differs from the case before us in a number of salient respects.

First, in obvious contrast to Stern's role, the role of the former employee, Kennedy, was limited to leaving Columbia's employ to open a business in competition with Columbia. Although Kennedy and the supplier met on several occasions to discuss Kennedy's future plans, Kennedy's relationship with the supplier did not give rise to a reasonable inference that Kennedy was aware of his co-defendant's strategy and had knowingly associated himself with it. "[T]he record [was] devoid of evidence that Kennedy was privy to [the supplier's] broader machinations . . . [or] knew that the probable effect of [the supplier's] actions would be to eliminate Columbia." *Columbia Metal Culvert*, 579 F.2d at 36.

Further, and in striking contrast to the instant case, the evidence was not susceptible of an inference that Kennedy conspired with the supplier because Kennedy acted to his own economic advantage; he had thoroughly substantiated his financial need to seek a more remunerative employment. Had Kennedy acted in an economically disadvantageous manner, a factfinder could infer an anticompetitive motive instigated by a persuasive or coercive co-conspirator.[32] Moreover, while not

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[32] Armstrong inexplicably cites to a conscious parallelism case, *Venzie Corp. v. United States Mineral Prod. Co., Inc.*, 521 F.2d 1309, 1314 (3d Cir. 1975), for the proposition that our precedent requires that "proof of an antitrust conspiracy must include the 'satisfactory demonstration of a motivation to enter an agreement' reflecting the conspiracy." Appellee's Brief at 53. In order to find evidence of concerted action in a parallel refusal

explicitly stated, it is clear that when negotiating with the supplier Kennedy had not yet assumed a dependent position with respect to the supplier, investing the supplier with potentially coercive influence over Kennedy. Therefore, in *Columbia Metal Culvert*, we ruled that there was "insufficient evidence from which a jury could find a 'unity of purpose, design or understanding' between Kennedy and the other defendants". *Id.* at 36.

Our conclusion that a conspiracy in violation of section 1 does not require the sharing of an identical anticompetitive motive is also supported by distinguished commentators. Examining vertical conspiracies, one respected scholar, Phillip Areeda, distinguishes cases in which the two alleged co-conspirators are both named defendants (*i.e.*, *Columbia Metal Culvert*) from those in which only one is named a defendant (*i.e.*, the instant case). Areeda suggests that in a vertical situation involving an alleged conspiracy between a supplier and a coerced dealer, the subordinate dealer should not be subjected to antitrust liability. 6 Areeda, Antitrust Law ¶ 1408d at 47-48 (1986). Accordingly, he opines:

> The precedents are numerous that a §1 conspiracy arises when an unwilling dealer, to avoid termination by [its] supplier, promises . . . to deal exclusively . . . . Of course, the vice of these

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to deal situation, we required: 1) action contrary to the co-conspirator's economic interest; and 2) a satisfactory demonstration of a motivation to enter an agreement as required in *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 287 (1968). These requirements insulate from liability coincidental, as opposed to concerted, parallel refusal to deal cases.

The case *sub judice* arises in an altogether different factual context. In this vertical matrix and given our standard of review, we find that the record is replete with evidence of Armstrong's motive and Stern's dependence upon Armstrong, should the jury choose to credit TINS' evidence. Thus we need not require the same checks against speculation in a vertical case as we do in a conscious parallelism case. As a factual matter as well, the evidence, if it is credited by the jury, suggests that Stern acted against its economic interest in reneging on distributing TINS.

> vertical restraints, if there is one, is not that the coerced buyer, for example, agrees to the seller's demands, but that the seller has market power and uses it to restrain competition.

Id. *Accord* 2 Kintner: Federal Antitrust Law §9.18 at 41-43 (unanimity of action is required and the co-conspirator's participation need only promote *his own* anticompetitive self-interest); *Milgram v. Loew's, Inc.*, 192 F.2d 579, 585 (3d Cir. 1951), *cert. denied*, 343 U.S. 929 (1952) (conspiracy is based upon three elements: 1) knowledge that concerted action in the scheme is contemplated; 2) uniform participation; and 3) pursuance of the scheme in apparent contradiction of the competitive interests of the participants). *See also Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F.2d 199 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962) (finding no conspiracy in a conscious parallelism action in which a co-conspirator did not act contrary to its economic needs).

Both Areeda and Kintner recognize that the motivations driving vertical co-conspirators will differ. Our caselaw does not controvert this sound reasoning. We conclude that although vertically aligned co-conspirators must share a commitment to a common scheme which has an anticompetitive objective, they need not share an identical motive for engaging in concerted action in violation of section 1 of the Sherman Act. We thus will vacate the directed verdict on TINS' section 1 claim and remand for a new trial on this count of the plaintiffs' complaint.

B. *Breach of Contract*

The plaintiffs also challenge the district court's May 25, 1988 grant of summary judgment in favor of Armstrong on their breach of contract claim. This claim is governed by Pennsylvania law as stipulated in the TINS/Armstrong contract. Our review of a grant of summary judgment is plenary.

At Count 3 of their Complaint, the plaintiffs averred that Armstrong's conduct--allegedly "improperly pressur[ing]" Stern to withdraw from TINS--constituted a breach of the settlement reached between TINS and Armstrong in early 1984. In granting summary judgment, the district court ruled that the settlement agreement did "not place any continuing duty on Armstrong to instruct its representatives not to discuss the TINS program with Armstrong wholesalers." J.A. at 70. In this appeal, the plaintiffs contend that the district court's construction is legally unsound and renders the settlement agreement useless to TINS, "eliminating any conceivable reason Fineman might have had to sign it."[33]

Our task must be to interpret the language of the settlement agreement in conformance with the intention of the parties at the time of contracting. *Ress v. Barent*, 548 A.2d 1259, 1262 (Pa. Super. 1988). We glean further guidance from the Supreme Court of Pennsylvania:

> In order to determine the meaning of the agreement, we must examine the entire contract since it is well settled that in construing a contract the intention of the parties governs and that intention must be ascertained from the entire instrument taking into consideration the surrounding circumstances, the situation of the parties when the contract was made and the objects they apparently had in view and the nature of the subject matter.

Lower Frederick Twp. v. Clemmer, 543 A.2d 502, 510 (Pa. 1988) (*quoting Mather Estate*, 189 A.2d 586, 589 (Pa. 1963)). The Pennsylvania Superior Court has instructed that "the intention of the parties is the foremost consideration" in construing a contract. *Vogel v. Berkley*, 511 A.2d 878, 880 (Pa. Super. 1986). "The court's interpretation must be one

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[33] The plaintiffs also make mention of an implied duty of good faith and fair dealing. As Armstrong points out, this allegation appears to have arisen initially upon appeal. Therefore we decline to address it.

which indicates the most reasonable and natural conduct of the parties based upon the intended result of the contract." *Id.* at 880-81. With these principles of contract construction in mind, we turn to the TINS-Armstrong settlement agreement.

The settlement agreement required Armstrong's Floor Division Vice President Dennis Draeger to send a designated letter to five specifically identified Armstrong distributors to assure them that Armstrong had no objection to their distributing TINS.[34] Settlement Agreement ¶ 1. J.A. at 7768. Draeger was also to follow-up those letters with personal telephone calls to confirm the substance of the letters. *Id.* Armstrong likewise agreed to provide a letter addressed to

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[34] In pertinent part, this letter represented Armstrong's position with respect to TINS as follows:

> We believe that specialization of sales management and sales personnel is the most effective way for a wholesaler to compete in the resilient flooring business.
>
> Mr. Fineman has assured us that it would be unnecessary to use the specialized selling staff on an ongoing basis to service or further promote his program. On that basis, we have become convinced that Mr. Fineman's program would not adversely affect this specialization when your Armstrong specialized selling force is used only for the initial presentations of TINS to potential TINS retail subscribers with a minimal time commitment of your selling force thereafter.
>
> Therefore, based upon Mr. Fineman's assurances, we advise you that Armstrong does not object to any Armstrong wholesaler utilizing the TINS program. You have my personal assurance, [insert name of addressee], that whatever independent business decision you make regarding the TINS program will not in any manner affect our goal of working together as a team.
>
> It is not the policy of Armstrong to express any opinions on products other than their own and, therefore, Armstrong expresses no opinion for or against the use of TINS.

J.A. at 7772-73.

Fineman without restrictions as to its use.[35] Settlement Agreement ¶ 2. A third letter was to be sent to any Armstrong distributor who questioned Armstrong's position with respect to TINS. Settlement Agreement ¶3. This letter is substantively the same as the letter Draeger was required to send to the five Armstrong distributors designated by Fineman pursuant to

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[35] This letter reads:

Dear Mr. Fineman:

Thank you for your time last week and your explanation of TINS. It is unfortunate that we have had a misunderstanding relating to the use of TINS by Armstrong wholesalers. As you know, Armstrong believes that specialization of sales management and sales personnel is the most effective method of distribution of our resilient flooring products. Thanks to your explanation and assurances, we now realize that the TINS program would not adversely affect this specialization concept.

Our other concern was the degree of availability of the TINS program to our wholesalers. You have addressed this concern by assuring us that if TINS is made available to an Armstrong wholesaler in a particular trading area, TINS will be made available on a competitively equal basis to all other Armstrong wholesalers in that particular trading area.

Therefore, Mr. Fineman, I have sent the attached letters to certain Armstrong wholesalers with which you are having negotiations. These letters are intended to clear up any misunderstandings and assure those wholesalers that Armstrong is not, in any way, attempting to influence their independent business decisions relating to the use of TINS. Of course, you must realize that Armstrong cannot, as a matter of policy, recommend a preference for any product which is neither manufactured nor marketed by Armstrong World Industries, Inc. We continue to follow this policy with respect to TINS.

Sincerely,

D. M. Draeger

J.A. at 7775.

paragraph 1. Either Fineman or TINS could request such a letter from Armstrong, or they could inform the wholesaler to make the request. *Id.*

Armstrong argues that, absent a request pursuant to paragraph 3, it did not owe a continuing obligation under the settlement agreement. The plaintiffs fail to meet this contention directly, implicitly recognizing that the plaintiffs failed to trigger Armstrong's obligation under paragraph 3. Nevertheless, they suggest that if the settlement agreement did not establish a continuing obligation, the plaintiffs gained nothing from signing it. Clearly, the unambiguous language of paragraph 3 imposed a continuing obligation upon Armstrong only in response to a triggering request.

The plaintiffs' more persuasive argument pertains to an alleged continuing obligation under paragraph 4. Appellant's Reply Brief at 17. Paragraph 4 of the settlement agreement provides:

> Armstrong represents that it has instructed all of its floor division district managers not to discuss the TINS program with Armstrong wholesalers and to refer any inquiries from wholesalers to senior sales management in Lancaster, Pennsylvania. Armstrong has further instructed its floor division district managers to inform their field representatives and personnel of said instruction.

If this language were susceptible to the district court's interpretation that it imposed only a one-time obligation upon Armstrong, according to TINS, the spirit of the agreement is undermined and TINS received inadequate consideration. For example, under this restrictive construction, Armstrong could have delivered a subsequent contradictory instruction and still have been deemed in compliance with the settlement agreement. Or, alternatively, Armstrong's district managers could have deliberately disobeyed their instructions without subjecting Armstrong to liability for breaching the agreement.

This restrictive interpretation of paragraph 4 reduces Armstrong's obligation to a hollow and meaningless exercise. The implicit assumption underlying paragraph 4 is that once instructed, Armstrong's district managers will prospectively comply with their instructions. The giving of a bare instruction divorced from any obligation to obey it would not have yielded anything of value to TINS. It follows that the only reasonable construction of paragraph 4 includes a continuing representation that Armstrong's district managers will abide by their instructions and that distributors' inquiries about TINS would be referred to Armstrong's Lancaster headquarters.

Armstrong contends in this regard that a restrictive reading of paragraph 4 should stand because TINS received adequate *quid pro quo* in paragraph 3 (providing for an Armstrong letter upon request). We reject this contention because, read as a whole, the settlement agreement provided two prophylactic measures against prospective Armstrong interference: 1) the enunciation by Armstrong's Lancaster headquarters of a neutral position on TINS (paragraph 4); and 2) confirmation of that position upon request in the form of a letter (paragraph 3). The first measure, insofar as it dictated the silence of Armstrong's district managers, by its terms was expected to operate without a specific request. In combination, the two provisions cover all the bases. We conclude that paragraph 4 of the settlement agreement did impose a continuing obligation upon Armstrong. For this reason, we will vacate the grant of summary judgment and remand this claim for trial on the question of whether that obligation was breached.

VII. *Election of Remedies*

Because we will remand this matter for a new trial upon TINS' tortious interference, Sherman Act section 1 and breach of contract claims, the district court may again confront the issue of an election of damages. Pursuant to the verdict, the district court entered judgment for TINS on the antitrust claims in the amount of $58,500,000, trebling the $19.5 million awarded by the jury, or at TINS' election, $217,700,000 for compensatory and punitive damages, plus prejudgment

interest. J.A. at 89.[36] TINS claims that it is entitled to recover both sums of damages. Since we have reinstated the contract claim, we will also address that count.

The district court accurately noted that TINS had premised both its antitrust and its tort damages upon its loss of future profits; we presume that the breach of contract damages would be predicated upon that same loss. For purposes of

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[36] This ruling was in part premised upon a concern that the jury had been unable to convey coherently whether any portion of the $17.7 million in antitrust damages and $19.5 million in tort damages awarded to TINS overlapped each other.

> The district court had instructed the jury as follows:
>
> If, but only if, you have awarded monetary damages as set forth in answers to *both* questions 4 and 10, does all or any part of each award represent the same damages, and if so, what sum of money is included in both awards?

J.A. at 100.

The jury first answered $37.2 million, revealing that it had simply added the two numbers, so the district court reinstructed the jury on that point: ". . . you can't recover twice for the same injury. . . . question number 11 asks you really, was there an overlap? . . . If there was commonality, if there was overlap, if there is potential for double recovery under both questions four [tort damages] and 10 [antitrust damages], then question 11 asks you to tell me what amount is common to both." J.A. at 7243-44.

The jury then returned with an answer of $1.8 million, which, perhaps coincidentally, also represents the difference between $19.5 and $17.7 million. Concerned that the jury may have merely subtracted, and not understood the overlap instruction, the district pointed out that their figure equalled the difference between the two damage awards and explained that subtracting them would not have conformed to his instruction. J.A. at 7251. After retiring once again, the jury returned "moments later" with a note "We stand by it."

The district court concluded that the jury's $17.7 million tort award equalled the damage figure of lost profits claimed by TINS' expert witness James Kobak whereas the record lacks any substantiation for an additional $17.7 million in lost profits on the antitrust claims, as would be true if the "overlap" were truly $1.8 million. J.A. at 101-02. Our independent review of the record also compels this finding.

compensatory damages, then, the district court appropriately limited TINS to a single recovery for lost profits. We are unpersuaded that a plaintiff whose case concerns a single course of conduct (Armstrong's interference with Stern's and TINS' prospective contractual relationship) and a single injury (TINS' lost future profits) should recover those profits twice or thrice over for each legal theory advanced in favor of liability. This would yield an unwarranted windfall recovery. No matter how labeled, TINS presented a single loss of future profits to the jury. Simply because TINS was able to wrap that loss into several different legal theories of recovery does not entitle it to recoup twice. Thus the district court may appropriately award a single compensatory damage figure, which might, upon retrial represent the jury award arising from the breach of contract claim, compensatory tort damages, or the antitrust damages prior to trebling.[37]

The same principle applies to the alternate punitive damage awards; TINS must elect between recovering under either tort law with any punitive damages or under its antitrust claim with its treble damages. TINS reasons that the recovery of both punitive damages and trebled antitrust damages would not constitute "double recovery," citing differing purposes allegedly served by punitive and trebled damages. Whereas traditional punitive damages serve to deter wrongful conduct and punish a tortfeasor, TINS argues that Congress envisioned that an additional remedial purpose would be served by trebled antitrust damages, namely the encouragement of private damages actions. *See Brunswick Corp.*, 429 U.S. at 485-86 & n.10. Accordingly, TINS suggests that recovery of both awards would not be duplicative and would promote remedial and desirable private antitrust actions. *See American Soc'y of Mechanical Engineers Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 575 (1982) (". . . the antitrust private action was created primarily as a remedy for the victims of antitrust violations").

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[37] We assume that because each would be based upon lost profits, these awards would be identical; if not, we suggest that the district court mold them to the conform to the evidence.

TINS is only partially correct in our view. Although treble damages are not solely punitive in character, they do serve a penal and deterrent function in addition to a remedial one, and as a consequence do overlap somewhat with punitive damages. *See Brunswick Corp.*, 429 U.S. at 477; *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968). Moreover, we fail to discern how requiring an election of damages would undermine the remedial purpose of trebled antitrust damages. Under an election scheme, the plaintiff will simply choose the larger of the alternative damage awards. Where a plaintiff can predict that trebled antitrust damages may exceed a compensatory and punitive damage award, an election scheme will not diminish a private party's incentive to bring an antitrust claim.

In the event that TINS prevails upon more than one cause of action upon retrial, we hold that the district court may properly require it to elect either tort or antitrust recovery and that TINS may only recover once for compensatory damages.

VIII. *Conclusion*

We will affirm those orders of the district court granting judgment n.o.v. to Armstrong on the Sherman Act section 2 claim and Fineman's individual tort claim. We will reverse the order of the district court granting judgment n.o.v. on TINS' tort claim and affirm the grant of a new trial on that claim. We will vacate the directed verdict on the Sherman Act section 1 claim and the summary judgment on the breach of contract claim.

Finally, we will remand this matter to the district court for a new trial on TINS' tortious interference, breach of contract and Sherman Act section 1 claims.

The assignment of costs will be set forth in a separate order.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ELLIOT FINEMAN and THE INDUSTRY NETWORK SYSTEMS, INC.,

Plaintiffs,

v.

ARMSTRONG WORLD INDUSTRIES, INC.,

Defendant.

Civil Action No. 84-3837

OPINION

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BISSELL, *District Judge*

This matter arises pursuant to several motions made by the defendant in light of the jury verdict reached on April 19, 1991. Defendant Armstrong World Industries, Inc. ("Armstrong") has renewed its earlier motion to dismiss all claims of the plaintiff, for judgment notwithstanding the verdict (J.N.O.V.), and for a new trial in the alternative.

I. *FACTS AND BACKGROUND*

Trial in this action took place over nearly three months, generating considerable evidence. Necessarily, then, the following is merely a summary of the background and procedural history. Where relevant to the motions herein, additional facts and evidence will be considered.

Plaintiffs are Elliot Fineman, a New Jersey resident, and The Industry Network System, Inc. ("TINS"), a New Jersey corporation of which Elliot Fineman is the majority shareholder.[1] Defendant Armstrong is a large corporation which manufactures, *inter alia*, floor covering, more particularly "resilient" floor covering often called linoleum in common parlance. In the time period most pertinent to this litigation, Armstrong also manufactured carpeting. Armstrong's products are distributed through independent companies known as wholesalers or distributors who maintain warehouse stocks of such products and use their sales personnel to solicit retailers or others to purchase such products.

In 1982 and 1983, Elliot Fineman and TINS were developing a "video magazine" for the floor covering industry.

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[1] Carol Arena and Gail Farrar were both minority shareholders in TINS.

Essentially, the plan was that TINS would sell the monthly video to floor covering distributors, who would in turn sell subscriptions to the program to retailers. A distributor would sign a "Letter of Intent" to become a TINS distributor, and then Fineman and his staff would run a two or three day training program at the distributors' place of business. This program would teach the salespeople how to sell the TINS magazine and how to improve sales overall. (*See e.g.* Px. 8001 at 15, TINS brochure describing sales program.)

The video was designed to be similar to a printed magazine, with "articles" on various topics. The plaintiffs described the video as follows:

> The magazine consisted of four parts. The first segment featured Al Wahnon, the editor of the industry newspaper (Floor Covering Weekly) who went behind the scenes of current relevant news stories and discussed and analyzed them from the floor covering retailers point of view. The second section featured plaintiff Fineman talking to professionals, such as economists and professors, or people whose areas include consumer attitudes, styling, design and from time to time sports people to discuss motivation. The third segment featured senior vice president Gail Farrar who travelled on site to retail stores throughout the country with a television crew. She interviewed at their store those retailers who are doing things that are successful, outstanding and helping them accomplish key

> goals. The fourth section featured the local TINS Distributor who used that segment as a marketing tool. Profits were to be earned from the sale of the magazine subscriptions, advertising royalties and commissions from the sale of video equipment.

(Compl., ¶ 11).

In early 1983, when TINS first launched its magazine, it encountered some difficulties recruiting floor covering distributors to become TINS distributors. Fineman accused Armstrong of exerting pressure on Armstrong distributors to dissuade them from becoming TINS distributors. These accusations resulted in an "Agreement of Settlement" between TINS and Armstrong on January 12, 1984, signed in order to avoid litigation.

In the following months, Fineman solicited at least six Armstrong wholesalers. Of these, three became TINS distributors, one remained ready to do so, and two declined. Fineman and TINS filed the present action on September 14, 1984, alleging that one of the distributors that declined, Stern & Company of Windsor, Connecticut, did so as a result of renewed pressure from Armstrong.[2] Plaintiffs contended that TINS was in a precarious financial condition as a result of the earlier wrongful acts of Armstrong such that losing Stern caused the company to fold. Plaintiffs therefore sought damages from Armstrong under various theories, including tortious interference with contract and antitrust violations.

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[2] Plaintiffs' complaint alleged that Armstrong also pressured Nelson & Small (the other declining distributor from New England), but this claim was dismissed by summary judgment in this Court's Opinion and Order of May 25, 1988.

This Court conducted a jury trial from January 23, 1991 until April 18, 1991.[3] The trial included testimony of more than 50 witnesses, a transcript of a thousand pages, conflicting opinions by expert witnesses, and a set of jury instructions of more than 80 pages. By the end of the trial, the only claims remaining were TINS' and Fineman's claim for tortious interference by Armstrong with TINS' business relationship with Stern and TINS' claims for monopolization and attempt to monopolize under § 2 of the Sherman Antitrust Act. On April 19, 1991, the jury returned a verdict in favor of the plaintiffs on all claims. On the tortious interference claim, the jury awarded $17.7 million to TINS and $2.275 million to Fineman in compensatory damages, and $200 million to TINS in punitive damages. The jury also awarded TINS $19.5 million in compensatory damages on the antitrust claims. Finally, the jury determined that $1.8 million was the "overlap" between the tort and antitrust damages awarded to TINS.[4]

Armstrong presently seeks judgment notwithstanding the verdict, or, in the alternative, a new trial.[5]

II. *JUDGMENT NOTWITHSTANDING THE VERDICT*

A. *Standards Governing J.N.O.V.*

Federal Rule of Civil Procedure 50(b) provides:

> **(b) Motion for Judgment Notwithstanding the Verdict.** Whenever a motion for a directed verdict at the close of all the evidence is denied or for any

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[3] The trial was subject to breaks in the presentation of evidence, some caused by this Court's schedule and others by the parties and their counsel.

[4] This determination is the basis for one of the defendant's motions for a new trial.

[5] All new trial motions will be discussed in a separate opinion to be issued shortly.

> reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict.... A motion for new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed....

Thus, a prerequisite to moving for a J.N.O.V. under Rule 50(b) is that the moving party must have moved for a directed verdict at the close of all the evidence. *Associated Business Telephone Systems Corp. v. Greater Capital*, 729 F.Supp. 1488, 1502 (D.N.J.), *aff'd*, 919 F.2d 133 (3d Cir. 1990) (citing *Skill v. Martinez*, 91 F.R.D. 498, 515 (D.N.J. 1981), *aff'd*, 677 F.2d 368 (3d Cir. 1982)). In fact, "[i]t is not enough if a party moves for a directed verdict at the close of their case. Rather, in order to preserve the right to move for a J.N.O.V., the moving party must renew his motion for a directed verdict at the close of all the evidence." (*Id.*, citing *United States for the Use and Benefit of Roper v. Reisz*, 718 F.2d 1004, 1007 (11th Cir. 1983)).

There are exceptions to the latter requirement, in certain circumstances where, as detailed in *Skill*:

> (a) there has been substantial, if not literal compliance with the rule;
>
> (b) where manifest injustice will otherwise occur since the verdict is totally without legal support;
>
> (c) where the trial judge in effect excused the failure to renew the motion; and
>
> (d) where the additional evidence was brief and inconsequential.

(*Id.*, citing *Skill*, 91 F.R.D. at 515 n. 14). In the present matter, Armstrong made motions for directed verdict at the end of all the evidence. The motions included all of the arguments made in its motions for J.N.O.V. presently being considered.

The plaintiffs, however, strenuously object to the defendant's motion based on the Connecticut Business Opportunity Investment Act ("Connecticut Act") on procedural grounds, claiming that Armstrong has waived this "defense." Specifically, plaintiffs claim that Armstrong cannot rely on the Connecticut Act because the issue was not asserted in its answer as required by Fed. R. Civ. P. 8(c).

The plaintiff's arguments are without merit, for two reasons. First, the defendant specifically raised the Connecticut Act in the Pretrial Memorandum and Order, as follows:

> 12. Whether the alleged contract or prospective business relationship between Stern and the TINS Corporation was unlawful under the Connecticut Business Opportunity Act, or was otherwise without legal effect, and any alleged interference therewith was therefore not a tortious act?

(Pretrial Memo, Defendant's Legal Issues at 93). In this Court and the Third Circuit, the Pretrial Order governs the ensuing litigation.

> Under Federal Rule of Civil Procedure 16, the pretrial order "shall control the subsequent course of the action unless modified by a subsequent order." When entered, the order limits the issues for trial and takes the place of the pleadings covered by the pretrial order. *See Basista v. Weir*, 340 F.2d 74, 85 (3d Cir. 1965); *Hoagburg v. Harrah's Marina Hotel*, 585 F. Supp. 1167, 1175 (D.N.J. 1984). Indeed, the pretrial order operates to preserve a claim or defense that would normally be waived by proceeding to trial. *See United States v. Hougham*, 364 U.S. 310, 316, (1960); *reh'g denied*, 364 U.S. 938 (1961); *Jenkins v. Carruth*, 583 F. Supp. 613, 615 (E.D. Tenn.), *aff'd*, 734 F.2d 14 (6th Cir. 1984); *United States v. Texas*, 523 F. Supp. 703, 720 (E.D. Tex. 1981).

Benvenuto v. Connecticut General Life Insurance Co., 643 F. Supp. 87, 88 (D.N.J. 1986). *See also Petree v. Victor Fluid Power, Inc.*, 831 F.2d 1191, 1194 (3d Cir. 1987) ("The finality of the pretrial order contributes substantially to the orderly and efficient trial of a case" and "supersedes the pleadings"). Because Armstrong included this claim in the Pretrial Order, it did not waive its right to assert this legal theory, and the plaintiffs had sufficient notice thereof.

Plaintiffs' reliance on cases such as *Kilbarr Corp. v. Business Systems, Inc.*, 679 F. Supp. 422 (D.N.J. 1988), *aff'd*, 869 F.2d 589 (3d Cir. 1989), is misplaced. In *Kilbarr*,

the defendants attempted to raise an issue for the first time after the matter had been tried, heard on appeal, and then remanded. In contrast, defendant herein raised the issue in the pretrial order and again by motion for a directed verdict at the close of the evidence.

Similarly, the present matter is distinguishable from *Bradford-White Corp. v. Ernst & Whinney*, 872 F.2d 1153 (3d Cir.), *cert. denied*, 110 S. Ct. 542 (1989), in which the defendant did raise the defense in its answer, but failed to file motions or present argument on the defense until after the jury reached a verdict and the judgment was entered. (*Id.* at 1154). The trial court refused to consider the defense because it was a "new issue, not raised at trial, premised on a noncontrolling decision which was reported prior to trial." (*Id.* at 1154-1155). In affirming, the Third Circuit made it clear that the defendant did not attempt to establish the affirmative defense before or at trial, and therefore it would be "grossly unfair to allow a plaintiff to go to the expense of trying a case only to be met by a new defense after trial." (*Id.* at 1161). In the present matter, the defendant raised the issue of the Connecticut Act in the Pretrial Order of June 5, 1990, presented evidence concerning the issue, and made a motion to dismiss at the end of all the evidence based thereon. There is no waiver here.

The second reason for considering the Connecticut Act in the present matter concerns the burden of proof. The plaintiffs bore the burden of proving each of the elements of the tortious interference claim. One of these elements, as more fully described below, is proof that TINS had a reasonable expectation of economic advantage in its relationship with Stern. In the context of the Connecticut Act, this required the plaintiffs to prove that the Act did not render any expectation tenuous or otherwise unreasonable. Thus, the plaintiffs miss the point by asserting that Armstrong failed to establish the "defense" of the Connecticut Act, because the issue is not a defense at all. It is, therefore, this Court's determination that Armstrong's motion for J.N.O.V. is appropriate in all procedural respects.

Once it is determined that the motion is procedurally correct, the next question is the applicable standard. This standard has been given various formulations,

although they are substantially similar. "When deciding a motion for judgment notwithstanding the verdict, the trial judge must determine whether the evidence and justifiable inferences most favorable to the prevailing party afford any rational basis for the verdict." *Bhaya v. Westinghouse Elec. Corp.*, 832 F.2d 258, 259 (3d Cir. 1987), *cert. denied*, 488 U.S. 1004 (1989) (citing *Berndt v. Kaiser Aluminum & Chemical Sales, Inc.*, 789 F.2d 253 (3d Cir. 1986)). *See also E.E.O.C. v. State v. Delaware DHSS*, 865 F.2d 1408, 1414 (3d Cir. 1989). In other words, the court must determine whether a reasonable jury could have found for the prevailing party. *Newman v. Exxon Corp.*, 722 F. Supp. 1146, 1147 (D. Del. 1989), *aff'd*, 904 F.2d 694 (3d Cir. 1990) (citing *National Controls Corp. v. National Semiconductor Corp.*, 833 F.2d 491, 495 (3d Cir. 1987); *Aloe Coal v. Clark Equipment Co.*, 816 F.2d 110, 113 (3d Cir.), *cert. denied*, 484 U.S. 853 (1987); *Marsh v. Interstate and Ocean Transport Co.*, 521 F. Supp. 1007, 1008 (D. Del. 1981)). It has also been said that "the court must find, as a matter of law, that the prevailing party failed to adduce sufficient facts to justify the verdict." *Grace v. Mauser-Werke Gmbh*, 700 F. Supp. 1383, 1387 (E.D. Pa. 1988) (citing *Link v. Mercedes Benz of North America, Inc.*, 618 F. Supp. 679, 693 (E.D. Pa. 1985), *aff'd in part* 788 F.2d 918 (3d Cir. 1986)). Yet another way of enunciating the standard is as follows:

> It is well established that judgment notwithstanding the verdict may be granted only if, as a matter of law, the record is critically deficient of that minimum quality of evidence from which a jury might reasonably afford relief.

National Freight v. Southeastern Pa. Transp. Auth., 698 F. Supp. 74, 76 (E.D. Pa. 1988), *aff'd*, 872 F.2d 413 (3d Cir. 1989) (citing *Danny Kresky Enterprises Corp. v. Magid*, 716 F.2d 206, 209 (3d Cir. 1983)).

The role of the Court is quite limited when considering a motion for J.N.O.V. "[T]he Court may not weigh evidence, pass on the credibility of witnesses, or substitute its

judgment of facts for that of the jury." *National Freight*, 698 F. Supp. at 76 (citing *Blair v. Manhattan Life Insurance Co.*, 692 F.2d 296, 300 (3d Cir. 1982)). Thus, "[a]lthough a court in viewing the evidence of record may have reached a different conclusion from that reached by the jury, that alone is not reason to enter judgment n.o.v." *Newman*, 722 F. Supp. at 1147.

The defendant herein seeks J.N.O.V. on the basis that no reasonable jury could have found for the plaintiffs on each element of each claim. It also renews a motion to dismiss both plaintiffs' tort claims due to the Connecticut Act which this Court treats as a motion for J.N.O.V., although it primarily rests on legal questions, as described more fully below. The latter motion will be considered first.

B. *Plaintiffs' Tort Claims: The Connecticut Act*

The Connecticut Act requires certain types of businesses to register with the Banking Commissioner of Connecticut prior to selling business opportunities in that State. Armstrong contends that TINS was not so registered prior to its dealings with Stern, that it should have been, and that its failure rendered the relationship with Stern unenforceable, and in fact illegal. Armstrong then argues that the claim for tortious interference therewith is invalid pursuant to the terms of the statute, and so it is entitled to J.N.O.V. as to both TINS' and Fineman's tortious interference claims.

In order to understand fully Armstrong's argument, some additional facts are necessary. As stated above, Elliot Fineman solicited Stern and Company of Windsor, Connecticut to become a TINS distributor in the spring of 1984. TINS provided Stern with a brochure captioned "The Industry Network System, Stern & Company, Inc., May 24, 1984." (Px. 8001). This brochure described the sales training program that TINS would provide to Stern if Stern became a TINS distributor. It also provided a chart entitled "Preferred Distributor Annual Income Stream" showing the income to be earned by Stern from distributing the TINS Magazine and other videos. These figures included distributor profits on sales of RCA televisions and video equipment, sold for use with the

TINS Magazine as a result of an arrangement between TINS and RCA. Also available were bonuses paid to Stern and its employees for each subscription sold.

As a result of the presentation made by representatives from TINS, Stern signed a "Letter of Intent" to become a distributor on May 24, 1984. The letter provided that "Stern & Company, Inc. wishes to accpet [sic] appointment as Distributor of The Industry Network System (TINS) with marketing rights" to TINS Magazine "in the primary trading areas of [Stern] ... at a fee of $16,000" plus expenses associated with the sales training program. (Px 1100A). Stern paid a deposit of $4,000 that day.

The sales training program began at Stern's place of business on Wednesday, June 20, 1984 and continued through Friday, June 22, 1984. TINS representatives made presentations to Stern employees until late Friday afternoon, when Stern's President, Alan Abrahamson, notified TINS representatives that Stern was terminating or canceling the Letter of Intent and not going ahead with the program.

TINS alleged that Stern breached its contract and demanded payment of an additional $4,000. By letter dated June 29, 1984, Stern's attorney Steven M. Gold informed Mr. Fineman that Stern did not owe and would not pay, taking the position that the "Letter of Intent" was invalid and unenforceable. (Dx. 1003). The premise for this claim was that the Connecticut Act required businesses to register their offerings with the Banking Commissioner, which TINS had not done. So, claimed Mr. Gold, the "Letter of Intent" was invalid and TINS was potentially subject to the authority of the Commissioner. Violations could result in fines, imprisonment, and various forms of equitable action such as appointment of a receiver. The final result was an exchange of mutual releases of all claims between TINS and Stern in August 1984.

Armstrong argues in support of its motion for J.N.O.V. that the "Letter of Intent" was properly voided by Stern based on the Connecticut Act, relying upon its legislative history and statutory language. As a result, the "Letter of Intent" between Stern and TINS could not be the basis of *any*

claims, including those made by plaintiffs herein. Thus, Armstrong seeks J.N.O.V. dismissing all the tortious interference claims of the plaintiffs.

This Court agrees with Armstrong, although under a slightly different analysis, that it is entitled to a directed verdict on all of plaintiffs' state-law tort claims. This Court had reserved decision on this question, preferring to permit the case to go to the jury in order that all parties, this Court and any reviewing court would have the benefit of a jury verdict on all claims presented to it, a procedure clearly contemplated by Rule 50(b). Now, however, defendant's motion must be addressed as a motion for J.N.O.V. It will be granted for the reasons which follow.

This Court determined, on directed verdict motions at the end of the plaintiffs' case, that New Jersey law governs the plaintiffs' tort claims. In so doing, this Court recognized that for these pendent claims, this Court must apply New Jersey's conflict of laws rule, which embodies a "governmental interest" approach to choice of law questions. *Veazey v. Doremus*, 103 N.J. 244, 248 (1986). Under that analysis, the determinative law is that of the state with the greatest interest in governing the particular issue. *See, e.g., White v. Smith*, 398 F. Supp. 130, 134 (D.N.J. 1975); *McSwain v. McSwain*, 420 Pa. 86, 94, 215 A.2d 677, 682 (1966). Particularly in light of the fact that plaintiffs are New Jersey residents and the repercussions of the alleged injuries were felt here, this Court reiterates its view that New Jersey substantive law governs the plaintiffs' claims for tortious interference with prospective economic advantage. Therefore, in determining whether the plaintiff provided sufficient evidence to withstand the motion for J.N.O.V., this Court looks to New Jersey law to determine the necessary elements of the claim.

The New Jersey courts have relied on the *Restatement (Second) Torts* for the definition of the cause of action. (*See e.g. Norwood Easthill Assoc. v. N.E. Watch*, 222 N.J. Super. 378, 385 (App. Div. 1988)). In the present matter, the relevant Restatement section is § 766B:

§ 766B Intentional Interference with Prospective Contractual Relation

One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of

(a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or

(b) preventing the other from acquiring or continuing the prospective relation.

The cause of action requires a tripartite situation wherein a third party intentionally and improperly interferes with a relationship between two other parties, from which relationship the complaining party reasonably expected to receive economic benefit. *Borbely v. Nationwide Mutual Insurance Co.*, 547 F. Supp. 959, 976 (D.N.J. 1981). Thus, the elements which the plaintiff must prove are (1) that there existed a reasonable expectation of economic advantage or benefit belonging or accruing to the plaintiff; (2) that the defendant knew of such expectancy; (3) that the defendant wrongfully, intentionally interfered therewith; (4) that, in the absence of interference it is reasonably probable the plaintiff would have realized his economic advantage; and (5) that the plaintiff sustained damage as a result thereof (proximate cause and proof of damages). (*See* Jury instructions at 24-25).

As suggested by the Restatement, it is no defense to such a claim that the contract interfered with is not enforceable because

> contracts which are voidable by reason of the statute of frauds, formal defects, lack of consideration, lack of materiality, or even uncertainty of terms, still afford a basis for a tort action when the defendant interferes with their performance.

Harris v. Perl, 41 N.J. 455, 461 (1964) (citing Prosser, *Torts* § 106 at 726 (2d ed. 1955)). Thus, for example, the *Harris* Court determined that a buyer was responsible for tortious interference with prospective economic advantage to the broker even where no broker contract had been completed. (*Id.* at 462). The Court said that "[t]he economic facts and the expectations of fair men with respect to real estate brokerage are clear enough. The role of the broker is to bring buyer and seller together at terms agreeable to both, and both know the broker expects to earn a commission from the seller if he succeeds." (*Id.*) That expectation was therefore protected.

Although there is a cause of action for tortious interference with respect to an unenforceable contract in some situations, this rule is not without limitations. These limitations depend on the nature of the relationship with which the defendant interfered. For example, in *Borbely*, the court granted the defendant's motion for J.N.O.V. on plaintiff's tortious interference claim because it determined that the contracts in question were terminable at will. Since the defendant had the right to terminate them at will, it could not be said that termination was wrongful. (547 F. Supp. at 976).

Prosser has also identified some of the limitations on the claim:

> Virtually any type of contract is sufficient as the foundation of an action for procuring its breach. It must of course be valid, in force and effect, and *not illegal as in restraint of trade, or otherwise opposed to public policy*, so that

> the law will not aid in upholding it.

(Prosser, *Torts*, § 129 at 994 (5th ed. 1984)) (emphasis added). In other words, that a contract is unenforceable is not a bar to a tortious interference claim, but that a contract is invalid as opposed to public policy is. As one court faced with a contract void due to violation of a licensing statute put it, plaintiff's "analogy to the statute of frauds is not apt, for that statute does not make the transaction illegal for lack of writing but merely denies the aid of the court in enforcing it." *Tanenbaum v. Sylvan Builders, Inc.*, 50 N.J. Super. 342, 355 (App. Div. 1958), *modified on other grounds*, 29 N.J. 63 (1959). This is as it should be, because the reason that the law protects otherwise unenforceable contracts from tortious interference is that "[i]n a civilized community, which recognizes the right of private property among its institutions, the notion is intolerable that a man should be protected by the law in the enjoyment of property once it is acquired, but left unprotected by the law in his efforts to acquire it." (*Harris*, 41 N.J. at 462) (quoting *Brennan v. United Hatters of North America*, 73 N.J.L. 729 (E. & A. 1906)). This policy is not served where the contract is illegal or void as against public policy.

Prosser further explains the policy behind allowing recovery for tortious interference with prospective economic advantage: "[i]n such cases there is a background of business experience on the basis of which it is possible to estimate with some fair amount of success both the value of what has been lost and the likelihood that the plaintiff would have received it if the defendant had not interfered." (Prosser, *Torts*, § 130 at 1006 (5th ed. 1984)).

Thus, although not required to prove that their relationship with Stern was an enforceable contract, TINS and Fineman had to prove that they had a reasonable expectation of economic advantage arising from that relationship. As the comments to the Restatement say, "[t]he relations protected against intentional interference ... include any prospective contractual relations ... *if the potential contract would be of pecuniary value to the plaintiff.*" (*Restatement (Second) Torts* § 766B, Comment c) (emphasis added). As a matter of law, this

requirement was not met in the present matter, because of the impact of the Connecticut Act.

The relationship between Stern and plaintiffs may be characterized as a prospective contract. Accordingly, if the question before the Court was its validity as between Stern and plaintiffs, this Court would apply Connecticut law because in contract cases, New Jersey courts apply the law of the place where the contract is made, "unless the dominant and significant relationship of another state to the parties and the underlying issues dictates that this basic rule should yield." *Ramsbottom v. First Pennsylvania Bank*, 718 F. Supp. 405, 407 (D.N.J. 1989) (quoting *State Farm Mutual Auto. Ins. Co. v. Estate of Simmons*, 84 N.J. 28, 37, 417 A.2d 488 (1980)); *see also McFadden v. Burton*, 645 F. Supp. 457, 465 (E.D. Pa. 1986). The assessment of the significant relationship should "encompass an evaluation of important state contacts as well as a consideration of the state policies affected by, and governmental interest in, the outcome of the controversy." *Ramsbottom*, 718 F. Supp. at 407 (quoting *State Farm*, 84 N.J. at 37, 417 A.2d 488). Under this analysis, Connecticut law would apply to determine the validity of the "Letter of Intent" primarily because it was to be fully performed there, but more importantly, because Connecticut's law concerning business opportunities represents the dominant and significant policy of protecting its residents in commercial dealings.

This Court has already determined that Connecticut law does not apply to determine the rights and liabilities as between Armstrong and plaintiffs. However, the reasonable expectation of economic advantage arising from the Stern-TINS relationship necessarily requires this Court to consider the nature of that relationship, under the law which governed it: that of Connecticut. This requires a careful scrutiny of the Connecticut Act, relied upon by Stern's counsel in declaring void Stern's prospective relationship with TINS, and upon which Armstrong relies in support of one aspect of its motion for J.N.O.V.

The Connecticut Act, Conn. Gen. Stat. § 36-503 *et. seq.*, was enacted to police business opportunities which are characterized by "high pressure salesmen who flash in and out

of motel rooms and are gone before the investor knows he's been fleeced." Woolf[6], *The Connecticut Business Opportunity Investment Act: An Overview*, 54 Conn. B. Journ. 415, 416 (1980) (quoting 12 *Continental Franchises Rev.* No. 10 at 1 and 2 (June 11, 1979)).[7]

Mr. Woolf described the Act as follows:

> In general, the Act requires sellers who plan to sell business opportunity investment programs to register such programs with the banking commissioner. Sellers of business opportunity investment programs are also required to provide prospective purchaser-investors with information necessary to make an informed decision before they make payment to the seller. In certain circumstances, sellers of these programs are also required to represent that the purchaser-investor's investments are secured in such a way as to actually provide security in the form of a bond or trust account. Finally, the Act prohibits representations which

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[6] At the time of publication of the article, Brian J. Woolf was Counsel and Executive Assistant to the Connecticut Banking Commissioner, although the article expressly states that the "opinions expressed herein are those of the author alone." Woolf later became Banking Commissioner.

[7] This view of the Connecticut Act is particularly appropriate in light of the practices of Fineman and his sales force. For example, Fineman testified that TINS prepared a script for all his salespeople (Tr. 6.126) which reflected his psychology of selling. (See *generally* Tr. 6.144-6.158). This psychology includes his view that the relationship between buyer and seller is a "war", (Tr. 6.157), in which his own salespeople "were killers." (Tr. 6.162). This kind of sales technique and attitude make it difficult for the prospective purchaser to adequately assess the item being sold and the nature of the promoting company.

> tend to mislead prospective purchaser- investors.

(*Id.*) (footnote omitted).

The Connecticut Act applies to "sellers" of "business opportunities." The Act defines "seller" as "a person who is engaged in the business of selling or offering for sale business opportunities." (§ 36-504(4)). The definition of "business opportunity" is, in relevant part:

> (6) "Business opportunity" means the sale or lease, or offer for sale or lease of any products, equipment, supplies or services which are sold or offered for sale to the purchaser-investor for the purpose of enabling the purchaser-investor to start a business, and in which the seller represents
>
> * * *
>
> (C) that the seller guarantees, either conditionally or unconditionally, that the purchaser-investor will derive income from the business opportunity; or that the seller will refund all or part of the price paid for the business opportunity, or repurchase any of the products, equipment, supplies or chattels supplied by the seller, if the purchaser-investor is unsatisfied with the business opportunity; or
>
> (D) that the seller will provide a sales program or marketing program to the purchaser-investor.

(§ 36-504(6)).

TINS' presentation brochure, coupled with the Letter of Intent, described above, make it clear that the distributorship arrangement for sale of the video magazine is within parts (C) and (D) of the definition. First, TINS guaranteed bonuses upon sales, (*see* Px. 8001 at 18), and represented particular figures which Stern would earn if it signed up as a distributor. (*See e.g.* Tr. 2.100-101 (Fineman)).

Second, TINS' training program is a marketing program within part (D), as is clear from the stated goals:

> 1. Train Distributor Sales Personnel to effectively present and close a promotional offering such as TINS.
>
> 2. Train the sales force in successful sales techniques which they will utilize in their day-to-day business dealings to produce dramatically improved results.

(TINS' brochure, Exh. Px. 8001 at 15).

The plaintiffs, however, argue that becoming a TINS distributor did not enable Stern to "start a business," thus TINS is not a seller within the meaning of the Act. (Plaintiffs' Opp. at 9). Relying on *Eye Associates, P.C. v. IncomRx Systems, Ltd.*, 912 F.2d 23 (2d Cir. 1990), plaintiffs argue that whether or not the TINS program was offered to start a business is a question of fact concerning the intent of the parties, about which there is no evidence. The plaintiffs' reliance is misplaced. The *Eye Associates* court, on appeal from a grant of summary judgment, reviewed the contract and other evidence to determine whether any issues remained. Based on such evidence, the court determined that such issues did remain and so remanded the matter. The court did not hold, as plaintiffs herein suggest, that intent fully governs the question of whether or not the TINS program was offered to "start a business."

In fact, Banking Commissioner Woolf has stated that:

> [I]f the purchaser-investor is in an already existing business, the Act would not apply. It should be noted, however, that the "existing business" concept should not be construed too broadly. In the author's opinion[8], the sale of the products, equipment, etc. to a purchaser-investor of an existing business must not substantially change, modify or add to the lines of products, equipment, etc., carried by the purchaser-investor. Any substantial changes, modifications or additions should be construed so as to preclude one from relying upon the "existing business" concept because of the substantive change in the nature of the business.

Woolf, *supra* at 419.

The plaintiff is also in error concerning the evidence in this case. There is considerable evidence showing that the TINS program was supposed to be extremely beneficial, in Elliot Fineman's estimation, to Stern by *both* increasing floor covering sales *and* generating income from the sale of products entirely new to Stern: subscriptions to the video magazine, televisions and videocassette recorders. (*See e.g.* Tr. 2.59-2.60 (Fineman)).[9] It is significant, too, that the majority of such evidence comes from the plaintiff Elliot Fineman himself. Thus, under the most reasonable definition of "new business," the TINS program constituted a completely new line of business:

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[8] This opinion was, at the time, that of only an author, but since he is now Banking Commissioner, this opinion has been specifically attributed to the Commissioner. (*See e.g. Eye Associates*, 912 F.2d at 27.)

[9] Indeed, Fineman characterized TINS as a "brand new concept," which was "revolutionary" (Tr. 6.154), thus showing that it was a new and different business from the sale of floor covering itself.

the sale of a monthly video magazine for floor covering retailers and the sale of equipment related thereto.

It has been held that the right to sell and market aircraft is a "new business" although the purchaser was already in the business of selling other kinds of transportation vehicles. (*See Eye Associates*, 912 F.2d at 27 (citing State of Connecticut, Office of the Banking Commissioner, Interpretive Opinion *In re Suma, Incorporated*, March 25, 1982)).

The evidence adduced at trial makes it clear that Armstrong met its burden of showing that TINS is within the Connecticut Act. The evidence provided by the plaintiffs in particular shows that its distributorship arrangement with Stern would enable the purchaser to modify an existing business in a substantial manner, require a payment of more than $100, and provide a sales or marketing program which would enable the purchaser to derive a profit. (Woolf, *supra* at 420). Thus, the TINS program is a "business opportunity" within the meaning of the Connecticut Act, §§ 36-504(6)(C), (D).

Overall, the plaintiffs misconstrue the burden of proof in this matter. It was their burden to prove that they had a reasonable expectation of economic advantage in their relationship with Stern, not the defendant's burden to prove that the plaintiffs did not. The defendant made it clear that the Stern-TINS relationship, and the claims against it, were void as a result of the Connecticut Act. Arguing that the evidence at trial irrefutably established that the Connecticut Act was applicable and barred plaintiffs' tortious interference claims, Armstrong moved to dismiss at the close of all the evidence, based on that statute. At that point it was incumbent upon the plaintiffs to seek to reopen their case to overcome such a showing, if they were truly surprised by the motion. No such application was made. The question herein is whether the *plaintiffs* have succeeded in overcoming the application of the Connecticut Act.

Plaintiffs' other arguments concerning this issue are unavailing. For example, plaintiffs argue that TINS was not a seller within the meaning of the statute because it offered its program to only one investor in Connecticut. (Plaintiffs' Opp.

at 10). This argument is specious in light of the uncontroverted evidence that TINS in fact sold its programs to other investors across the country. Restricting the definition of "seller" to one who sells more than one program within the State is unreasonable in light of the statute's avowed purpose of protecting buyers. Under plaintiffs' interpretation, a party could avoid application of the statute by selling to only one investor in the state on an "exclusive" basis, thus leaving the investor beyond the protection of the statute. This is an unreasonable interpretation of the statute, and this Court will not adopt it in the absence of direction from the Connecticut courts.[10]

Plaintiffs also argue that it is not clear whether TINS' distributorship arrangement for sale of video magazine subscriptions constitutes a "sales program" or "marketing program" within the Act. Plaintiffs rely on the fact that there is no definition within the Act, requiring instead a case by case analysis. (*See Eye Associates*, 912 F.2d at 28 (citations to legislative history and interpretative statements that the determination is based on a case by case analysis)). However broad or narrow the definition may be, it is beyond contention that one of the avowed benefits of becoming a TINS distributor was its sales training program as described in its brochure. (*See* above). This program is clearly a "sales" or "marketing" program, as described by the plaintiffs themselves. Furthermore, the video magazine played in open court demonstrates that it is a program designed to enhance the distributor's sales and marketing with its retailers.

Plaintiffs also argue that Armstrong did not prove that TINS failed to comply with the Connecticut Act. Probative evidence on this question comes from the June 29, 1984 letter from Stern's counsel stating that TINS failed to register and

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[10] In *Eye Associates*, apparently the only case interpreting the Connecticut Act, the court noted that "the Act does not clearly state that companies selling a single business opportunity are exempt from its coverage. On remand, therefore, the district court will have to determine whether the sale of a single business opportunity brings the seller within the reach of the statute." (912 F.2d at 26). Accordingly, it is entirely appropriate for this Court to consider the relevant information to determine whether a party is within the statute when it only offers one opportunity within the State.

therefore its breach of contract claims were not valid. (Dx. 1003). Contrary to the plaintiffs' assertion, this letter was admitted into evidence without any restrictions as to its use, and without objection from plaintiffs' counsel. (*See* Tr. 7.123). Furthermore, Mr. Fineman testified as follows concerning the letter:

> Q. Do you recall Stern, for its part, had some claims against you?
>
> A. No, Stern had no claims against us. Their attorney came up with some kind of law that Connecticut required TINS or any company that fell in our category to get some kind of clearing with the banking commissioner ...
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> * * *
>
> Q. Apart from whether you agreed with [your attorney] or not, Mr. Fineman, the question is, did the Stern's company assert any claims?
>
> A. They asserted a claim that [I] wasn't supposed to ask them to join the TINS network. That was their claim until I filed something with the banking commissioner.

(Tr. 7.122:1-6; 7.122:13-17). The only reasonable inference from such testimony is that Mr. Fineman did not in fact file or "get some kind of clearing" with the Banking Commissioner. Once again, defendant having introduced such evidence demonstrating that TINS did not register, it was up to the plaintiffs to show that TINS did in fact comply with the Connecticut statutory requirements. They introduced *no* evidence of such compliance.

Plaintiffs' assertion that Stern is exempted from the Connecticut requirements by virtue of its size (over $1 million net worth) is also without merit. The statute includes its own burden of proof: "In any proceeding under this subsection, the burden of proving an exemption is upon the person claiming it." (§ 36-508(e)(5)). In the present matter, the only evidence concerning Stern's net worth came from Armstrong's concerns that Stern was inadequately capitalized. (*See e.g.* Tr. 24.15-24.17 (testimony of Armstrong's credit manager)). Plaintiffs failed to prove otherwise, and failed to seek to reopen their case in order to do so. Indeed, in attempting to prove that Armstrong controlled Stern, plaintiffs went to considerable lengths to prove that Stern was actually in financial trouble. (*See e.g.* Px 5009 (Armstrong's Risk Account Analysis, Aug. 15, 1984); Px 5012 (same, Nov. 16, 1984)).

Finally, this Court should address the plaintiffs' argument that this motion should be denied because Armstrong, as a third party, cannot assert Stern's rights under the Connecticut Act. (Plaintiffs' Opp. at 19-21). Plaintiffs miss the point. The defendant is not asserting Stern's rights under the Act; indeed, Stern asserted and exercised its own rights in counsel's letter of June 29, 1984. Rather, defendant has argued, and this Court finds, that the existence of the Connecticut Act, the June 29 letter, and the other evidence cited above renders any expectation of profit from the Stern-TINS relationship unreasonable as a matter of law. The issue is not whether Armstrong was "privileged" to interfere with this void, illegal relationship. Rather, plaintiffs have failed to meet their burden of proving that the relationship engendered any reasonable expectation of economic advantage.

Thus, the Connecticut Act applied to TINS on its face, and TINS failed to take steps to comply with the requirements of the Act. These requirements are particularly interesting in light of the evidence revealed in this case. Section 36-508 of the Act imposes registration and financial disclosure requirements before a business opportunity may be presented in Connecticut. The financial information which must be provided is substantial:

> (b) The seller shall file with the commissioner (1) a balance sheet, income statement and statement of changes in financial condition of such seller as of a date not more than four months prior to the filing of the registration statement (2) a balance sheet of such seller, an income statement and statement of changes in financial position for the most recent fiscal year audited by an independent public accountant or an independent certified public accountant and (3) a balance sheet and income statement and statement of changes in financial position for the prior two fiscal years reviewed by an independent certified public accountant who provides an opinion stating that he is not aware of any material modifications that should be made to the financial statements in order for them to be in conformity with generally accepted accounting principles. If any material changes in the financial condition of such seller occur after such statements are prepared, such seller shall disclose such changes and explain their significance to the operation of a business opportunity.

(Conn. Gen. St. § 36-508(b)).

Furthermore, § 36-506 requires that the seller provide substantial information directly to the purchaser-investor, including (but not limited to) information about past business conduct, personal conduct (bankruptcy and criminal) of those involved in the venture, clear descriptions of the method by which the funds to be earned by the purchaser were

calculated, numbers of prior business opportunities sold by the seller and the names and addresses of such buyers, information about whether such purchasers voluntarily terminated the arrangement, and a copy of the financial statement required to be filed under § 36-508. In addition, the document provided to the seller, at least ten days prior to signing a contract or exchange of money, must include the following:

> (27) A section entitled "risk factors" containing a series of short concise captioned paragraphs summarizing the principal factors which make the business opportunity one of high risk or of a speculative nature. Such factors shall include, but not be limited to: The absence of profitable operations within the previous three years; an erratic financial position of the seller; the particular nature of the business in which the seller is engaged or proposes to engage; any adverse background information regarding executive officers and directors of the seller, including prior business failures, criminal convictions or personal adjudications of bankruptcy; limited experience or lack of experience of the seller's management with respect to the particular business; and the identity and relationship to the seller of any customers, the loss of any one of whom would have a material adverse effect on the seller. Where appropriate, reference shall be made to other sections of the disclosure document where more detailed information has been disclosed.

(Conn. Gen. St. § 36-506(b)(27)).

The considerable reporting requirements of the Connecticut Act clearly show that the Legislature was concerned with "fly-by-night" operations who arrived in the state, coerced funds from Connecticut businesses, and then folded or otherwise became unable to perform. This policy compels this Court to the conclusion that not only is TINS literally within the language of the Act, but application of the Act to TINS serves such policies.

TINS was exactly the sort of operation which the Connecticut legislature was interested in policing. As indicated above, the theory of the plaintiffs' case is that TINS was in a financially troubled situation at the time that Stern backed out of the Letter of Intent, such that losing Stern caused the entire company to fold. Furthermore, Fineman testified rather extensively that he never revealed his company's financial position to prospective buyers of the video magazine. (*See e.g.* Tr. 7.35-7.36 ("The last thing I would have done on any sales call would be to discuss with a prospective customer what our business plans were, our financial condition was, what the state of our situation was.")) This position, though callous and deceptive, is certainly understandable in light of TINS' substantial operating losses for the first five months of 1984, and its deficit position in the amount of $739,346 as of May 31, 1984. (Dx. 127, prepared by TINS' accountants, Seiden & Thaler, C.P.A.s, on June 22, 1984). Revelation of such information might well have caused Stern to reconsider entering a long-term relationship with TINS, since such a relationship necessarily depended upon the survival of TINS, particularly TINS' ability to bear the considerable expense of producing the monthly video magazine on which Stern would risk its reputation with its retailers. More importantly, Stern had a statutory right to this information. Therefore, this Court finds that either a Connecticut or New Jersey state court faced with

the present issue would determine that TINS was within the scope of the Connecticut Act.[11]

The evidence is beyond contention that TINS did not comply with the Connecticut Act, although required to do so. Since it failed to register, this plaintiff was prohibited by § 36-510 from making sales and committing other acts:

> *No person shall* in connection with the sale or offer for sale of a business opportunity: (1) *Sell or offer for sale* a business opportunity in this state or from this state unless it has first been registered with the commissioner and declared effective by the commissioner in accordance with the provisions of section 36-505; (2) *represent that the business opportunity will provide income or earning potential of any kind* unless the seller has documented data to substantiate the claims of income or earnings potential and discloses this data to the prospective purchaser-investor at the time such representations are made; ... (5) make any claim or representation in advertising or promotional material, or in any oral sales presentation, solicitation

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[11] Indeed, the plaintiffs' desperate arguments to the contrary only demonstrate that TINS is indeed within the scope of that Act. (See Plaintiffs' Opp. at 16). Plaintiffs assert that sellers have "significant rights" under the Act, referring to a statute of limitations and a clause requiring the purchaser to return the seller's goods upon declaring a contract void. (*Id.*) Neither of these "rights" bears any relevance to the present matter. Stern voided the Letter of Intent only five weeks after signing it and asserted its claims at that time. Furthermore, Stern had received no video magazines from TINS at the time it canceled, and had in fact spent its own money acquiring televisions and VCR's which it later had to get rid of.

> or discussion between the seller and a prospective purchaser-investor, which is inconsistent with the information required to be disclosed by this chapter; (6) directly or indirectly (A) employ any device, scheme or artifice to defraud, (B) make any untrue statement of material fact or *omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading*, or (C) engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

(Conn. Gen. Stat. § 36-510(1), (2), (5), (6)) (emphasis added).

There are several effects of acting in contravention of the Act, the most important of which is that the purchaser-investor may, within one year of the date of the contract with the seller, declare that contract void:

> If a business opportunity seller ... fails to give the proper disclosures in the manner required by section 36-506 ... then within one year of the date of the contract, upon written notice to such business opportunity seller, the purchaser-investor may void the contract and shall be entitled to receive from such business opportunity seller all sums paid to such business opportunity seller.

(Conn. Gen. Stat. § 36-517(a)).[12]

This is precisely what Stern did in its counsel's letter of June 29, 1984, as described above. Thus, the contract between Stern and TINS was void under the Act. This Court could, at this point, end this discussion. The underlying relationship between Stern and TINS was void by reason of the Connecticut Act pursuant to the stated policies of that State. Accordingly, as a matter of law, there was no reasonable expectation of profit from this relationship, so it cannot form the basis for tortious interference claims. Thus, the defendant is entitled to judgment notwithstanding the verdict on these claims.

However, there are several additional considerations which further support this Court's determination: policies particularly relevant to the case at bar.

Specifically, the Connecticut Act provides:

> (h) *No person who has made or engaged in the performance of any contract in violation of any provision of this chapter* or any regulation or order adopted or issued under this chapter, or who has acquired any purported right under such contract with

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[12] Contrary to the plaintiffs' assertion, there is no scienter requirement on the part of the seller before the purchaser may declare the contract void. (*See* § 36-517(a)). Under § 36-517(h), the scienter requirement applies only in the situation involving acquisition of a contract right created in violation of the statute. (*See* discussion *infra* regarding § 36-517(h)). Thus, it is inapplicable to the present situation. Scienter is required, however, before fines may be imposed upon a seller who acts in contravention of the statute. (*See* § 36-516, which is also inapplicable to the present matter.)

Similarly, plaintiffs do not even allege that the motivation of Stern in terminating the Letter of Intent is important or relevant to the application or effect of the Connecticut Act. This argument would have failed had the plaintiffs advanced it because the Act is directed to the *seller's* acts, not the purchaser-investor's.

> knowledge of the facts by reason of which its making or performance was in violation, *may base any cause of action on the contract.*

(Conn. Gen. Stat. § 36-517(h)) (emphasis added). Thus, since TINS acted in violation of the Connecticut Act, the plaintiffs' present action for interference with the relationship arising from said violation is specifically prohibited by the Act.[13]

In this regard, it should be noted that the plaintiffs' argument distinguishing void and voidable contracts is not applicable in the present situation. The Connecticut Act specifically treats a contract voided at the option of the buyer as a void contract by eliminating all claims based thereon.[14] This treatment serves the purposes of the Act, and is consistent with the policies applicable in New Jersey as well, as indicated below.

At this point, it should be reiterated that an illegal contract must be distinguished from a merely unenforceable one. As Prosser suggests, those which are unenforceable due to defects such as the statute of frauds may nonetheless form the basis of a tortious interference claim. In contrast, an illegal contract, or one that is against public policy, should not form the basis of such a claim because allowing the tortious interference claim is akin to recognizing the contract. In the present matter, application of the Connecticut Act to the Stern-TINS relationship renders the relationship illegal. Indeed, the Second Circuit's interpretation of *Tanenbaum* succinctly captures the distinction to be made here:

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[13] If a consummated contract may not be so enforced under this statute, necessarily a prospective economic relationship could not be. That is, TINS could not have sued to force Stern to execute and perform its distributorship agreement.

[14] Plaintiffs' suggestion that the registration requirements of the Connecticut Act violate first amendment rights of free speech (Plaintiffs' Opp. at 16) is so specious as to require no further comment.

> [I]t is not accurate to say that the court denies enforcement of an otherwise valid agreement, as with the statute of frauds, for the New Jersey courts have distinguished the licensing act from the statute of frauds on the basis of the *underlying illegality of conduct* in violation of the former.

Weston Funding Corp. v. Lafayette Towers, 550 F.2d 710, 714 (2d Cir. 1977) (emphasis added) (citing *Tanenbaum*, 50 N.J. Super. at 355, *modified in other respects*, 29 N.J. 63). Thus, plaintiffs' reliance on this Court's earlier opinion and its jury instructions that an unenforceable contract may form the basis of a tort claim is misplaced.[15]

This Court, sitting in diversity as to plaintiffs' tortious interference claim, must determine how a New Jersey court would respond to the present circumstances regarding the Connecticut Act. It is this Court's opinion that a New Jersey court would enforce the policies embodied in the Connecticut Act, including that represented by § 36-517(h), and rule as a matter of law that plaintiffs' tort claims are prohibited. In other words, a party who cannot sue for tortious interference with a void relationship in Connecticut may not do so by fortuitously filing its lawsuit in New Jersey.

> It is a well-accepted principle of contract law that the illegality of a contract is to be determined by the law of the place of contract. *If that law makes the contract itself illegal, of course, it is void everywhere.*

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[15] Furthermore, this Court is not bound by its summary judgment opinion to the extent that it denied the motion based on the available evidence. That opinion was based on a review of some of the evidence only to determine whether a jury question might exist. The proofs at trial were not identical, and so may support different conclusions.

Staedler v. Staedler, 6 N.J. 380, 389 (1951) (emphasis added). *See also Louis Schlesinger Company v. Kresge Foundation*, 312 F. Supp. 1011, 1028 (D.N.J. 1970) (same); *Design-4 v. Masen Mountainside Inn., Inc.*, 148 N.J. Super. 290, 293 (App. Div.), *certif. denied*, 75 N.J. 6 (1977) ("Generally, the law will not assist either party to an illegal contract; the law leaves the parties where it finds them"). Thus, the courts of New Jersey will refuse to enforce illegal or void contracts, including in situations where, as here, the contract is void as a result of a failure to comply with a registration or licensing requirement. *See e.g. Accountemps v. Birch Tree Group*, 115 N.J. 614 (1989); *Stack v. P.G. Garage, Inc.*, 7 N.J. 118, 121-122 (1951) (unlicensed practice of law); *Gionti v. Crown Motor Freight Co.*, 128 N.J.L. 407, 411 (1942) (unlicensed architect); *Design-4*, 148 N.J. Super. at 293 (unlicensed architect); *Tanenbaum v. Sylvan Builders, Inc.*, 50 N.J. Super. 342, 354 (App. Div. 1958) (unlicensed real estate broker); *Nitta v. Yamamoto*, 31 N.J. Super. 578, 584 (App. Div. 1954) (unlicensed employment agency); *Solomon v. Goldberg*, 11 N.J. Super. 69, 75 (App. Div. 1950) (unlicensed real estate broker); *accord Restatement (Second) Contracts*, § 181 (1979); 6A Corbin, *Corbin on Contracts*, § 1512 (1962). Indeed, Connecticut follows the same principle. *See e.g. Douglas v. Smulski*, 20 Conn. Super. 236, ____, 131 A.2d 225, 226 (Super. Ct. 1957) (contract for architectural services made by an unlicensed architect is "illegal and void as against public policy") (citing *Gionti*, 128 N.J.L. at 411).

Not only will the courts of New Jersey refuse to enforce an illegal or void contract, they will not permit a party to such a contract to sue for interference therewith. For example, in *Tanenbaum*, 50 N.J. Super. 342, the Appellate Division considered the plaintiff's tortious interference claim based upon a broker's "contract." The plaintiff, however, was not properly licensed and therefore was specifically precluded by statute from enforcing any contract for commissions. In refusing to allow the plaintiff to seek damages against a third party for tortious interference with such a contract, the Court stated that:

> The licensing statute ... represents the public policy of the State, and

> is not merely a regulation of private property law. The court will prohibit its circumvention by denying relief in any case where the effect, direct or indirect, of allowing an action would be to recognize a transaction consummated in violation of the statutory provision.

(*Id.* at 355). Thus, the Court determined that allowing a claim for tortious interference based on a void contract would serve to recognize the void contract, a position which is contrary to the stated public policy of New Jersey. *See also Associates Financial v. Bozzarello*, 168 N.J. Super. 211, 214, 402 A.2d 942 (App. Div. 1979) ("The express legislative intent [in requiring foreign corporations to register] was to deny to foreign corporations which decline to candidly report their activities in this State ... the use of our courts to enforce their rights. Plaintiff and its assignor cannot evade this clearly expressed legislative purpose by the wily formality of an assignment of a contract or cause of action.")

New Jersey does not have a statute which is the same as Connecticut's Business Opportunity Investment Act. However, the policies embodied in Connecticut's statute, protecting the consumer from financially unstable sellers presenting slickly packaged programs to sales targets, are not foreign to New Jersey. *See e.g.* N.J.S.A. 45:15-16.27 *et seq.* (The Real Estate Sales Full Disclosure Act, regulating promotional plans to sell land outside New Jersey to New Jersey residents); N.J.S.A. 14A:13-11 ("No foreign corporation transacting business in this State without a certificate of authority shall maintain any action or proceeding in any court of this State"); N.J.S.A. 14A:13-14 *et seq.* (Corporation Business Activities Reporting Act, requiring reporting to the state with violations resulting in closed access to the courts); N.J.S.A. 17:16A-1 *et seq.* (Reporting and licensing requirements for investment companies, violation prohibits transactions and is a misdemeanor).

Thus, enforcing the Connecticut Act by disallowing the plaintiffs' claims for tortious interference herein is consistent with stated policies of New Jersey. Accordingly, this Court determines not only that the Connecticut Act's terms result in a failure of proof on an essential element of plaintiffs' claims, but that the courts of New Jersey would enforce the policies embodied in that Act. Armstrong is entitled to judgment notwithstanding the verdict on TINS' and Fineman's claims for tortious interference with the relationship or prospective relationship with Stern.

C. *Plaintiffs' Tort Claims: Insufficient Evidence*

Even if this Court found that the Connecticut Act did not bar plaintiffs' claims, it would grant the defendant's motion for J.N.O.V. for insufficiency of the evidence. This Court has already summarized the relevant legal requirements for proving a claim of tortious interference. The evidence, even viewed most favorably towards the plaintiff, is critically deficient with respect to two of these elements: wrongful conduct and proximate cause.

1. *Wrongful Conduct*

In order for conduct to be "wrongful" there must be proof of "malice." *Louis Kamm, Inc. v. Flink*, 113 N.J.L. 582, 588, 175 A. 62 (1934) (citing *Temperton v. Russel*, 1 Q.B. 715, 728). Malice as an element of this tort is defined as the intentional doing of an act without justification or excuse.[16] *Printing Mart v. Sharp Electronics*, 116 N.J. 739, 752 (1989) (citing *Rainier's Dairies v. Raritan Valley Farms, Inc.*, 19 N.J.

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[16] The malice standard that applies to tortious interference with a prospective contract is less stringent than that required for punitive damages despite the fact that the word "malice" is used for both. As more fully described below, punitive damages may be awarded in New Jersey only where the conduct of the defendant is "particularly egregious." *Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 654-55 (1986). *See also Leimgruber v. Claridge Assoc. Ltd.*, 73 N.J. 450, 454 (1977). Compare the Court's Jury Instructions at pp. 25 and 46. The use of the term "malice" in this section of the present opinion refers to the lesser standard as an element of the tortious interference claims.

552, 563 (1955)); *see also Louis Kamm, Inc.*, 113 N.J.L. at 588) (same).

In the present matter, no reasonable and rational juror could have determined that Armstrong acted wrongfully from the evidence shown by the plaintiffs. The picture which the plaintiffs painted at trial bears no resemblance to a portrait of reality, and was not created as an appeal to reason and objectivity from the jurors. Rather, plaintiffs, with trial counsel as their chief artist, created a surreal collage from detached, isolated events which they tortured and twisted in a calculated appeal to passion, fantasy, conjecture and sympathy rather than reason. The core of the plaintiffs' case is the extraction of single words, phrases and incidents taken out of context, and the recasting of them in unreasonable shapes.

Plaintiffs place considerable emphasis on one question and one answer arising at the deposition of Robert Roth taken on July 15, 1985. That question and answer relate to one small segment of a three-hour business meeting, on June 7, 1984, attended by Mr. Roth and Mr. Guzinsky of Armstrong, and Alan Abrahamson (President of Stern): Roth's response to Abrahamson's statement that Stern had agreed to become a TINS distributor. The excerpt reads as follows:

> Q. Did you say to him Alan, I don't think this makes a lot of sense in the Armstrong scheme of things, given the fact that we do have our own video program that can help you increase your profitability, that type of thing?
>
> A. That's probably what I said because we have an overlap program.

(Tr. 9.171:11-17). Based on this question and answer, plaintiffs argue that Armstrong maliciously and intentionally "scuttled" the TINS-Stern relationship by forcing Stern to withdraw.

This single question and answer, however, was plucked out of context. It appeared at the end of 15 pages in the deposition (all of which was read into the record at the trial) beginning at Tr. 9.157. A reasoned review and analysis of that entire conversation certainly will not support the argument that here was Roth insidiously, intentionally and maliciously planting in Abrahamson's mind the implied threat that big troubles lay ahead for him with Armstrong if he continued in the TINS program. Upon being confronted in the deposition with Humphrey's memorandum of September 12, 1983 (Px. 165) and being asked if he had acted consistent with that memorandum in discussing the subject of TINS with Abrahamson, Roth replied:

> But it's after the fact. He signed up for the program. The program is his. There was no discouragement on my part. He has the program.

(Tr. 9.162:13-15). Once again, on the same subject:

> Q. Did you follow Mr. Humphrey's instructions to discourage your wholesalers' participation?
>
> A. Alan had signed up for the program. Alan was a TINS distributor. It's a fait accompli. It's done.

(Tr. 9.163:16-22).

Furthermore, the excerpt of the Roth deposition read into the record by plaintiffs' counsel does not reveal any reaction from Abrahamson to Roth's comments about TINS. That subject was addressed, however, when Roth testified live before the jury. After repeating, to the jury, that he had expressed surprise that Stern had signed up for TINS because he believed there was an overlap between that program and Armstrong's video dealer training, Roth testified as follows:

Q. Did Mr. Abrahamson say anything to you when you expressed this surprise?

A. As I recall, I think he made a statement that it would fill in a void that we didn't have something like that.

Q. What would fill in the void?

A. TINS.

Q. Did he explain to you what about TINS he believed would fill a void that Armstrong didn't serve in this nation? Did he say something?

A. I can't really be specific. At that time I had never seen a TINS video, so I don't really recall specifically what he said. I know he said that, but specifically I don't.

Q. So your best recollection is he said something along those lines?

A. Right.

Q. TINS does something that the Armstrong program doesn't do?

A. Right. I think he said something like that.

Q. Did you respond to that comment?

A. I don't think so.

Q. How was it left? How long did their [sic] discussion about TINS last would you say?

A. As I recall, it was a fleeting discussion. We went on to something else.

(Tr. 17.173:2-24)).

This Court is fully aware that the jury, as instructed, was perfectly free to accept certain testimony of Mr. Roth (or any witness) and reject or accord diminished weight to other portions of testimony from the same witness. However, the constant harping at the one question and answer, taken completely out of context, and employing it as the linchpin for supposed conduct by Armstrong so heinous as not only to sustain the tortious interference and antitrust claims but also to support a claim for punitive damages goes far beyond any appeal to reason, objectivity or sound judgment. Regrettably, the rhetoric of plaintiffs' counsel drew the jurors right along with him to an irrational verdict undoubtedly reached in heavy reliance upon the unsupportable inferences which plaintiffs asked the jurors to draw from this one question and answer in the Roth-Abrahamson conversation of June 7, 1984. It is undisputed that Roth's brief, off-the-cuff remark took place within a conference which lasted several hours. Furthermore, the subject was dropped when Abrahamson said the TINS program would fill a gap in Stern's business. No jury could reasonably infer from this statement that Armstrong acted with any level of malice or intent to harm. Even in the face of the January 1984 Settlement Agreement, no jury could reasonably infer that Roth's brief discussion of TINS (rather than referring Abrahamson to Lancaster) was anything other than inadvertent. The Humphrey memo, written five days after the meeting on June 12, 1984, certainly couldn't have prompted any statement from Roth occurring on June 7. Furthermore, the statement is not itself a threat, does not suggest a threat, and did not take place in a context suggesting a threat. At the very most it was

an expression of Armstrong's view (albeit from the wrong source) to which Abrahamson had an appropriate response.

The plaintiffs' fixation on the term "assistance" in the Humphrey memo of June 12 is similarly a flagrant distortion of the evidence. The memo advised all Armstrong district managers "to inform them [Armstrong wholesalers who sought Armstrong promotional assistance for the TINS program] that we are unable to offer any assistance." (Px. 525). The plaintiffs assert that "assistance" means *all promotions*, whether or not related to the TINS magazine. (*See e.g.* Tr. 39.35-36 (Kramer Closing)). Therefore, the plaintiffs assert that the June 12 Humphrey memo created "a sinister code" which effectively barred any new promotions, and "pulled" all existing promotions from those Armstrong dealers who signed up with TINS.

Contrary to such eloquent and emotional arguments, the language of the memo taken in context allows only one reasonable inference, that Armstrong would offer no promotional assistance applicable only to the TINS magazine system:[17]

> [W]e (Armstrong) are not in a position to evaluate the effectiveness of the TINS program; however, we feel that since all Armstrong wholesalers are not involved in the program, it would be improper for Armstrong to participate in the system. Therefore, if any wholesalers request Armstrong's participation, either on a local level or a national basis, you should inform them that we are unable to offer any assistance. You should make sure

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[17] TINS was aware that this was Armstrong's position, at least as early as the generation of the January 1984 settlement. It was a position which plaintiffs own witness (Wolfe) found reasonable and understandable (*infra*).

> that your representatives are not involved in any sales presentations on this system or any other program not provided by Armstrong.

(Px. 525). The entire memo deals only with promotions related to TINS, not all promotions. Therefore this Court holds that no reasonable jury could find that the June 12, 1984 Humphrey memo creates a reasonable inference that Armstrong acted with malice.

The plaintiffs had also attempted to show, in support of their reliance on the June 12 memo regarding assistance, that there were specific promotions which Armstrong "yanked," *i.e.* made unavailable, to Stern upon learning of its Letter of Intent with TINS. These allegations were never supported by the evidence.

John Fischer, Stern's Manager of Armstrong Resilient Sales, testified that, although he told Alan Abrahamson that Armstrong would not make available promotional monies for TINS, he (Fischer) had never specifically discussed the subject of TINS with any Armstrong representative. Fischer's only such discussion in this timeframe had occurred between May 24 and June 7, 1984 in which he had sought a special price on additional Promotional Sundial resilient which he planned to use as an introductory special for TINS subscribers. Fischer also testified that Roth's assistant, Pat Lee, advised him that there was a supply of this product available; however, that it could not be made available to Fischer at a special price. Fischer testified that he never mentioned the name TINS specifically to Pat Lee.

Consistent with evidentiary principles governing a motion for J.N.O.V., this Court is prepared to assume (as the jury could have found), although contrary to Fischer's testimony, that he did specifically discuss the Promotional Sundial as a potential TINS promotion, and that Lee refused to sell it to him at a discounted price in connection with the TINS program. The Court will also assume, for purposes of the present analysis, that this Promotional Sundial "special" was the

fifty-three cent deal which was discussed in the evidence. Nowhere in the record before the Court, either directly or by permissible inference, is there evidence that Armstrong either denied to Stern any promotions or yanked from Stern any promotions previously committed and totally unrelated to Stern's effort to market TINS to the retailers, because of the mere fact that Stern was considering signing up with TINS. The only reasonable (as opposed to emotionally-based or speculative) inference from the considerable testimony on this subject is that Armstrong (whether through Pat Lee, Fischer's conclusion or the Humphrey June 12, 1984 memo) would not provide promotional "assistance" in the form of a discount on an Armstrong product made available only to a distributor for marketing to his retail customers as a TINS-related opportunity. To do so would violate Armstrong's marketing policy by providing a discount on a particular product to one of its distributors but not to another.

Plaintiff's primary witness concerning supposed "yanked" or withdrawn promotions, John Wolfe, understood that the above analysis was all that Fischer and Abrahamson were talking about when this subject was discussed at their meeting with Wolfe, following the sales presentation on June 22, 1984.[18] Wolfe understood that any decision by Armstrong either to withhold or withdraw a promotional opportunity from Stern was linked specifically to the issue of whether that

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[18] Incidentally, according to Wolfe, Abrahamson had observed, as early as Wednesday morning *at the start* of Wolfe's sales presentation to Stern's salesmen, that he was not getting strong promotional support from Armstrong for the types of resilient promotions that he had hoped to run with the TINS program. (Tr. 5.121:13-5.122:3). If Alan Abrahamson were the "Jack Palance" that plaintiffs' counsel made him out to be, concealing a conspiracy with Armstrong and plotting like a "thief" to steal the benefits of the TINS sales presentation, knowing all along that he would not go through with the TINS program because of Armstrong's pressure, can it reasonably be concluded that he would have made this revelation to Wolfe at the very commencement of the sales training session? Based on this testimony, from plaintiffs' own witness whose veracity they urged vigorously, the inevitable conclusion is NO. While not critical to this Court's adjudication of the present motions, this is but an additional example of the lack of evidentiary support for the contrary conclusion which plaintiffs' counsel urged before the jury with such fervor and colorful imagery.

promotion was going to be tied to a TINS sales effort. Moreover, Wolfe testified on direct examination that when this subject was addressed on the evening of Friday, June 22, 1984, his immediate response was that Stern (and Wolfe himself obviously) should not be surprised by this because for Armstrong to make available a promotion to a particular distributor who had signed up with TINS and was going to use the promotion solely in conjunction with marketing the TINS program, would be to favor that distributor over others of Armstrong, in violation of its uniform marketing policy. (Tr. 5.152-5.155). There was no insidious threat here by Armstrong to yank or withhold all "assistance" whether or not related to TINS, in order to coerce Stern into withdrawing from its relationship with the plaintiff company. There is no evidence in the record that such a direct threat was ever made. There is no evidence in the record that in fact Armstrong did pull or yank any promotion or assistance that would otherwise have been available to Stern. Furthermore, Wolfe, TINS' man on the scene, at the time he was confronted with the promotional issue, knew exactly its limited context and so testified before this jury. It was patently unreasonable for plaintiffs to urge their argument on this point and equally unreasonable for the jury to agree. Indeed, both TINS and Fineman himself were aware of Armstrong's position no later than May 24, 1984, the day TINS and Stern signed the Letter of Intent. In Wolfe's exact words:

> Q. Now, in that May 24 meeting with Mr. Abrahamson, you and Mr. Fineman told Mr. Abrahamson that Armstrong would not reimburse Stern for the 59 cents illustration we have been talking about. Is that correct?
>
> A. No, I don't think that is correct, sir. I think that the conversation would have been more general in its nature. I don't recall a specific promotion from Armstrong being discussed. But, again, it would not surprise me at all. That would have been very

consistent with our honesty to have lowered expectations of an Armstrong participation.

Q. Well, based on your experience at that time, you had no expectation that Armstrong would pay Stern 59 cents under the assumptions that we have been making here on the chart. Is that correct?

A. Well, more specifically, that Armstrong would not go out of its way to lend an advantage to one of this [sic] distributors versus another distributor in the same geographical territory.

Q. And if Armstrong had paid Stern 59 cents on this promotional Sign-Up Special, and if Nelson and Small was not a TINS distributor, you would no longer have a level playing field up here. Is that right?

MR. KRAMER: Objection to the form of the question.

THE COURT: Objection overruled.

A. Yeah, I would say that's correct, sir.

Q. Now, Nelson and Small was an Armstrong wholesaler for resilient back in 1984. Is that correct?

A. Yes, sir.

> Q. And I believe you testified yesterday that, correct me if I'm wrong, that it's generally known in the floor covering industry that Armstrong has a level playing field policy for it's --
>
> A. I would say absolutely, sir.
>
> Q. Very strong policy?
>
> A. It's by my experience.

(Tr. 6.16:3-6.17:11). No jury could reasonably accept plaintiffs' rhetoric about Armstrong's actions with Stern regarding promotional assistance in the face of this testimony from TINS' most knowledgeable witness on that subject.

Plaintiffs' arguments based on the classification of certain events and items as "confidential" is the most blatant example of pulling single words out of context to generate an irrational conclusion. The evidence showed that the Roth-Abrahamson meeting of June 7, 1984 was considered confidential by the participants. The Humphrey memo of June 12, 1984 was also labeled "confidential." In addition, Armstrong's distributorship agreement with wholesalers provides:

> From time to time during the performance of this Agreement, the Wholesaler will become privy to various information considered by Armstrong to be confidential. It is mutually agreed that disclosure of such confidential information by the Wholesaler to any third person or entity will be adequate cause for the termination of this Agreement.

(Nelson & Small Agreement, Px. 1244, ¶ 11). The plaintiffs claim that the very fact that the June 7, 1984 meeting between

Roth and Abrahamson was classified "confidential" permits the inference from Roth's statements regarding TINS that Armstrong acted with the necessary malice. (Tr. 39.71- 39.73 (Kramer Closing)). This argument is based on pure speculation and ignores the proper context of the meeting. The meeting was properly deemed "confidential" since it involved a broad range of topics dealing with Sterns' business, including financial information. The plaintiffs would have the Court believe that, since the meeting was deemed "confidential" and the TINS system was mentioned, a reasonable juror could find that some dubious, sinister plot existed to destroy TINS because the disclosure of "confidential information" is cause for termination of a distributorship agreement. This speculative quantum leap is based solely on the use of the common, multidimensional term "confidential," without regard to the particular, different context of each use of the term. This Court finds that no juror could make such a connection through a reasonably drawn inference, but only through the impermissible conjecture urged by plaintiffs' counsel.

The plaintiffs also assert that the "Confidential" marking on the top of Humphrey's June 12, 1984 memo (Px 525) would allow a reasonable inference that Armstrong acted intentionally and wrongfully. (Tr. 39.71-39.73 (Kramer Closing)). No reasonable jury could draw such an inference. Even if the explanations of Humphrey and Draeger are disregarded, the only permissible, reasonable inference is that this memo was marked confidential to restrict those who would have access to it at Armstrong. The "confidentials" in the Humphrey memo, in the distributor agreements, and in the Roth-Abrahamson meeting are simply not rationally related in any way. This is particularly true where, as here, there is neither direct nor circumstantial evidence that the contents of the June 12 memo were ever revealed to Stern.[19]

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[19] Indeed the evidence reveals that Abrahamson's last contact with Armstrong (Roth) was (at the latest) June 8, 1984. Note the strained, unsuccessful efforts of plaintiffs and their counsel to generate later meetings between those gentlemen. (*See infra* at 59-60.)

Plaintiffs argue as well that the distributorship agreement provides an incentive for concealment, including perjured testimony before this Court, to avoid termination by Armstrong for revelation of "confidential" information. (Tr. 39.72 (Kramer Closing)). This was another emotional, impassioned, incendiary plea to the jury to draw an impermissible inference. Indeed, the prevalence and emphasis on this argument before the jury in summation prejudiced Armstrong before the jury and contributed significantly to a verdict based not upon reason, objectivity and evidence, but, despite cautions by this Court, upon emotion, speculation, sympathy and impermissible inferences.

The picture painted by the plaintiffs, with their counsel as the artist, was not realism, as it must be for the jury to rationally ascertain and decide the truth, but surreal, a Dali (Salvador Dali, surrealist painter, known for the illogical and inconsistent images of his paintings). The plaintiffs have painted a detached nose in one corner with their unsupported "assistance" argument. The plaintiffs then painted a detached mouth with only one lip, representing the incompleteness and disregarded context of its use of Roth's statements on June 7, 1984. The plaintiffs' use of three unrelated references to the term "confidential," in order to ascribe some significance to it, was the painting of three detached eyes spread far apart and completely unconnected. Then, having pointed out these pieces, the plaintiffs asked the jury to draw lines between them to establish a face portraying malicious intent and wrongful conduct. However, to continue the analogy, the lines do not meet in such a fashion. Instead, connecting these pieces (an effort which itself required rank speculation) leaves the reasonable juror with only a surreal image bearing no resemblance whatsoever to a realistic portrait.

The following language of the D.C. Circuit is particularly appropriate in the present matter:

> We are of course hesitant to nullify a jury's findings of fact. ... But the jury's primacy as factfinder cannot exempt it from the bounds of reasonableness. A

> defendant who is clearly not responsible for a harm should not have to pay for it. ... The court submits to the jury only those issues on which the party with the burden of proof offers "significantly probative" evidence. ... This judicial screening undoubtedly involves the court in some gauging of probabilities, but only at the extremes.... Performance of the task is an essential backstop to judicial definition of the law; if courts' endorsement of verdicts is automatic, the law, however, sound, can simply drift off into irrelevance as juries do their will.

Drabkin v. Alexander Grant & Co., 905 F.2d 453, 457-58 (D.C. Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 559 (1990) (citations omitted). In this case, the jurors' verdict was also without rational, reasonable evidentiary foundation. (*Id.*)[20]

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[20] The plaintiffs, both at trial and in opposition to the present motions, place undue reliance on evidence as to 1983 events. The Court, over objection by the defendant, admitted such evidence (including memoranda) from the latter part of 1983 for whatever its probative value might be regarding the claims in the present suit. Even ascribing to the 1983 evidence the maximum weight and materiality which a jury could rationally accord to it, that evidence is insufficient (even when considered with all other relevant evidence) to sustain plaintiffs' claims. This evidence is admittedly remote in time from the commission of the alleged torts in June 1984. Furthermore, there were significant intervening events, including the settlement agreement and the successful sign-up of Armstrong distributors without objection by the defendant, such that the 1983 evidence does not provide sufficient additional support for the jury verdict to permit it to withstand the defendant's motion for J.N.O.V. For a more detailed review of the particular 1983 evidence, see the section of this opinion regarding TINS' claim for punitive damages.

2. *Proximate Cause*

Even if this Court had determined that there was sufficient evidence to prove tortious conduct by Armstrong, the Court would nonetheless grant defendant's motion for J.N.O.V. on the ground that there was no evidence on the question of proximate cause. Proof that Armstrong's conduct was a proximate cause of plaintiffs' injuries is a required element on which the plaintiffs bore the burden of proof.

All of the relevant evidence on the question of Armstrong's conduct is discussed in the sections concerning the wrongfulness of Armstrong's conduct. Of such evidence, only Roth's statement and the promotional information conveyed to Fischer were ever conveyed to Stern. Even if considered with all other evidence, including Armstrong's strength as Stern's creditor and supplier, the evidence is grossly insufficient as a matter of law to prove causation, that is that Stern withdrew as a result of pressure from Armstrong. Even the supposed threat of withdrawing promotional assistance (the June 12, 1984 memo) was never communicated to Stern; it cannot therefore constitute a cause of Stern's decision to withdraw from TINS. There is a complete failure to prove proximate cause.

Indeed, the plaintiffs engaged in a conscious, tortured effort to directly improve on the evidence by placing Roth with Abrahamson on more occasions than June 7. Early in the trial, Fineman testified that Roth met with Abrahamson on June 14, June 21 and June 26. (Tr. 2.71). Plaintiffs' counsel, on direct examination of Fineman, then made a concerted effort to line up the Roth-Abrahamson meetings with the days that Stern employees should have had appointments with retailers to present the TINS program. (Tr. 2.78). Then, of course, Fineman would be able to testify that no such appointments were made, leading to the presumption that none were made because of Roth's meetings with Abrahamson during the relevant period. However, in the middle of this, defense counsel objected and the Court conducted a sidebar conference. At the conference, plaintiffs' counsel could not identify the source of Fineman's information about the Roth-Abrahamson meetings, and so the Court recessed for lunch.

Upon returning from the break, counsel and the Court reviewed the foundation for Fineman's testimony that Roth met with Abrahamson after the June 7 meeting. It was thereupon revealed that the calendar upon which Fineman relied, indicating meetings with Roth after June 7, in fact belonged to another distributor, not Abrahamson. (Tr. 2.82-2.85). The Court was therefore required to give a curative instruction to the jury that there were no such meetings. (Tr. 2.88-2.89). At the time, on the second day of the trial, it appeared that the entire matter was simply an excusable, inadvertent error on the part of plaintiffs and their counsel. Whether or not that remains the Court's conclusion, this transparent effort is symptomatic of plaintiffs' case as a whole which was based on speculation, innuendo and appeals to the jurors' emotions, unsubstantiated by the evidence adduced at trial.

The record is therefore critically devoid of any evidence showing that Stern's decision to back out of the TINS distributorship was made as a result of any pressure or threat from Armstrong. At the very most, it could reasonably be concluded that Abrahamson believed that Armstrong would not support the program through special resilient promotions that would be available for him solely because he was a TINS distributor. While this belief might have been an ingredient in Abrahamson's decision, Armstrong's actions did not rise to the level of being a proximate cause for that decision to withdraw Stern from the TINS program; and no reasonable juror could conclude otherwise.

D. *Elliot Fineman's Individual Tort Claim*

The jury awarded Elliot Fineman $2.275 million in damages on his claim that Armstrong's tortious interference with TINS' relationship with Stern injured his reputation and goodwill as a consultant to the floor covering industry. Armstrong's entitlement to J.N.O.V. on the tortious interference claim necessarily entitles it to J.N.O.V. on this individual claim as well. However, even if the jury's verdict survived as to TINS, Armstrong is nonetheless entitled to J.N.O.V. as to Fineman's individual claim. There is a critical insufficiency of evidence showing, either directly or by permissible inference, that Armstrong specifically intended to injure Fineman in his

individual capacity when it allegedly interfered with the Stern/TINS relationship.

The elements of a claim for tortious interference are based primarily on the *Restatement (Second) of Torts*, as described above. The comments to the Restatement help to interpret it. Specifically relevant to the present question is comment p to § 766, which states in relevant part:

> The person protected by the rule stated in this Section is the specified person with whom the third person had a contract that the actor caused him not to perform. To subject the actor to liability under this rule, his conduct must be intended to affect the contract of a specific person. It is not enough that one has been prevented from obtaining performance of a contract as a result of the actor's conduct ... thus, if A induces B to break a contract with C, persons other than C who may be harmed by the action as, for example, his employees or suppliers, are not within the scope of the protection afforded by this rule, *unless A intends to affect them. Even then they may not be able to recover unless A acted for the purpose of interfering with their contracts.* (See § 767 comment h.)

(*Restatement (Second) Torts*, § 766, comment p) (emphasis added). Under this rule, arguendo, defendant Armstrong is A, Stern is B, and TINS is C. Fineman is a person other than C who is allegedly harmed as a result; and, indeed, is alleging a different financial injury than that sustained by C (TINS). Accordingly, Fineman has a cause of action only if A

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No. 92-1201

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ARMSTRONG WORLD INDUSTRIES, INC.,

Petitioner,

v.

THE INDUSTRY NETWORK SYSTEM, INC. AND ELLIOT FINEMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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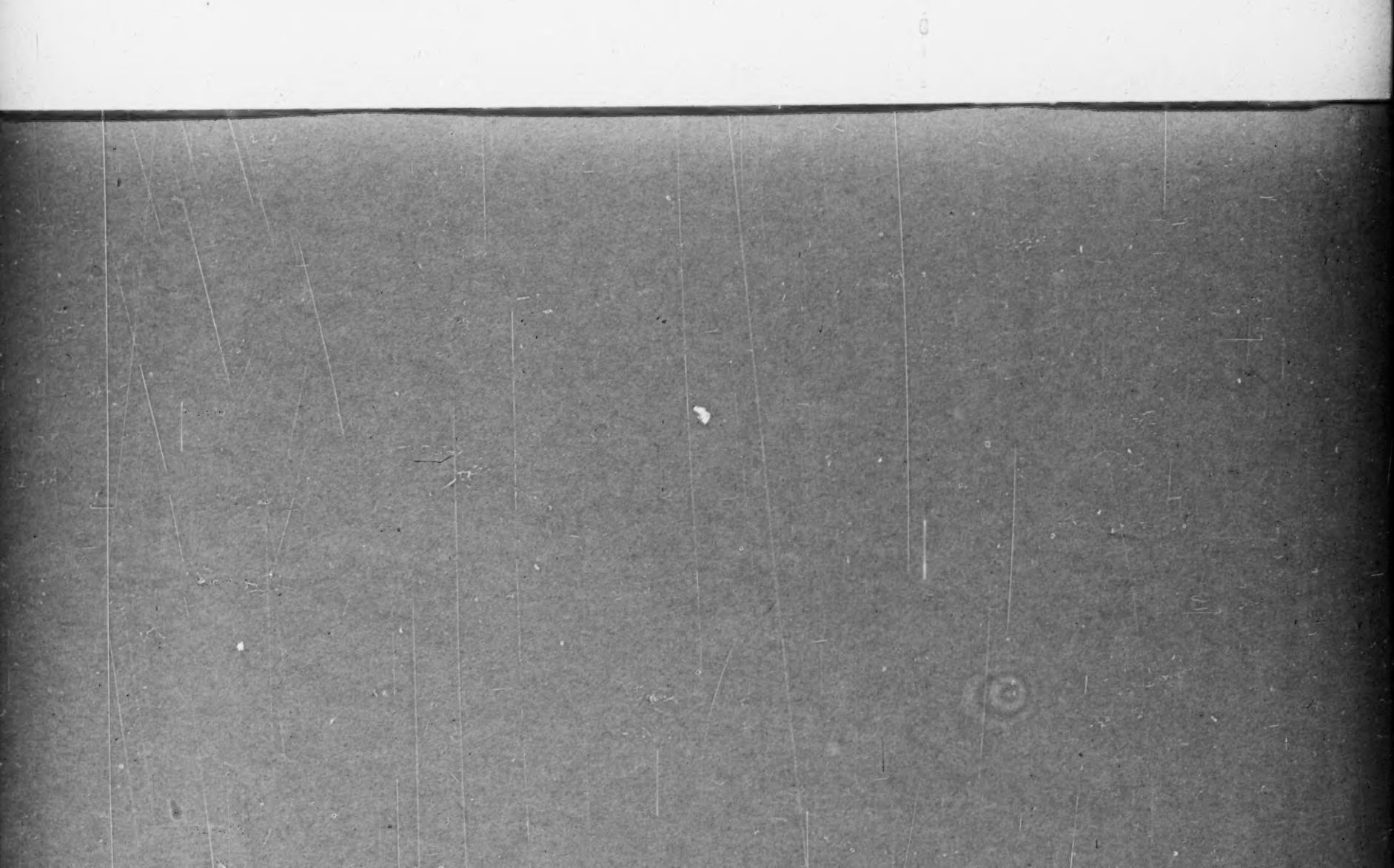

RULE 29.1 STATEMENT

Pursuant to Rule 29.1, Petitioner Armstrong World Industries, Inc. has no parent company and no subsidiaries other than wholly-owned subsidiaries.

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ARGUMENT

Respondents (hereafter "TINS") argue that this is a "fact-intensive" case in which petitioner (hereafter "Armstrong") has advanced "chiefly a sufficiency-of-the-evidence" argument.[1] But Armstrong does not ask the Court to rule on the sufficiency of the evidence. Instead, it requests the Court to accept the evidentiary facts deemed material by the Third Circuit in its analysis of TINS' Section 1 Sherman Act claim and to grant the petition because the Third Circuit's ruling is in sharp conflict with controlling decisions of this Court as well as those of other circuits.

TINS further asserts that inasmuch as this case also involves claims under New Jersey's law, "any decision by this Court would likely be irrelevant" to further proceedings. Opp.1. This assertion ignores the settled law that federal Sherman Act precedents guide the application of New Jersey's antitrust law[2] and tortious interference standards.[3] In any

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[1] Brief in Opposition at 1. Hereafter, citations to TINS' brief will be identified as "Opp.___;" citations to the Petition for Certiorari will be identified as "Pet.___."

[2] *See Desai* v. *St. Barnabas Medical Center*, 103 N.J. 79, 97, 510 A.2d 662, 671 (1986) ("Federal interpretations of the Sherman Act inform our evaluation of this claim."); *New Jersey* v. *Lawn King, Inc.*, 84 N.J. 179, 192, 417 A.2d 1025, 1032 (1980) (same).

[3] New Jersey's tortious interference standards are "substantially similar" to those in the Restatement (Second) of Torts (1979). *Printing Mart-Morristown* v. *Sharp Elecs. Corp.*, 116 N.J. 739, 752, 563 A.2d 31, 37 (1989). For a claim based on tortious interference with a terminable-at-will arrangement such as the Letter of Intent in this case, Section 768 of the Restatement explicitly recognizes "competition as proper . . . interference" if the defendant does not employ either (i) an "unlawful restraint of trade," which refers to "Federal legislation and statutes in many states [which] prohibit inducement not to deal with competitors [if the refusal to deal] . . . unreasonably restrain[s] competition," *id.*, comment *f*, or (ii) "wrongful means," which refers to such conduct as "physical violence" or "criminal" activities not present here. *Id.*, comment *e*.

event, this Court has not hesitated to reverse summarily an antitrust ruling that clearly ignores the Court's precedents even though additional issues may remain on remand. *See Palmer* v. *BRG, Inc.*, 111 S. Ct. 401, 403 n.7 (1990).

TINS' third argument — that review by this Court would be "premature" (Opp. 1) because the Third Circuit ordered a second trial — is contrary to numerous precedents, including *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), in which this Court granted certiorari and reversed a remand decision of the Third Circuit. Certiorari is appropriate where, as here, there is need for guidance because a court of appeals has decided an important question of federal law in a way that conflicts with applicable decisions of this Court or decisions of other circuits. S. Ct. Rule 10. The need for such guidance, evident in *Matsushita*, is even more pressing here. Unlike the "daunting[ly]" fact-intensive international conspiracy in *Matsushita*, 475 U.S. at 576, the crux of this case is one oral statement made in a manufacturer's routine sales effort with a distributor; such business conduct recurs countless times each day, but under the Third Circuit's reasoning, it could generate extensive antitrust litigation across the entire commercial landscape.

1. **The Vertical Conspiracy Question**. TINS' most egregious misstatement is the assertion that the Third Circuit's conspiracy analysis "discussed . . . at length and undeniably applied" (Opp. 6) the limitations on reasonable inferences, as imposed by antitrust law under *Monsanto* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) and *Matsushita*. Those two cases were mentioned only in the context of the Third Circuit's *tort analysis* (26A), which rejected Armstrong's argument urging the court to recognize the "heightened standard of proof" — required by *Monsanto* and *Matsushita* in assessing TINS' antitrust claims — as also being appropriate for TINS' tort claims in which lawful competition is a crucial factor. The Third Circuit assumed "that antitrust law requires such a standard" but was "not persuaded that it [the

standard] should apply to a New Jersey tortious interference claim." 27A. Thus, the Third Circuit "reject[ed] Armstrong's assertion that 'it would be illogical to apply differing legal rules on permissible interference for antitrust and tort claims where, as here, the *very same conduct* is challenged as both tortious interference and an antitrust violation.'" 28A (emphasis in quoted brief).

In the Third Circuit's subsequent conspiracy analysis (77A-84A), *Monsanto* and *Matsushita* were never even mentioned. To the contrary, the Third Circuit acknowledged, in a footnote, which ironically is quoted and stressed by TINS (Opp. 7), that the court's analysis of "reasonable inferences" for the antitrust conspiracy claim was based on the very *same analysis* in assessing the tort claims: "[F]or the reasons provided in Part III [on the tort claim] we reject Armstrong's formulation of the reasonable inferences that may be garnered from the trial record." 79A n.30.

The Third Circuit's sharp and unexplained departure from *Monsanto* and *Matsushita* could not be clearer: It expressly disavowed the rule of those antitrust precedents in formulating "reasonable inferences" relating to TINS' tort claim; then, in its antitrust conspiracy analysis, the Third Circuit expressly relied upon its tort analysis of "reasonable inferences" to reject Armstrong's arguments that *Monsanto* and *Matsushita* do not permit such inferences for a Sherman Act vertical conspiracy claim.

Despite the intemperate tone of the Brief in Opposition, the central point encompassed in the vertical conspiracy question stands unrebutted. The *only* purported wrongful conduct of Armstrong identified in the Third Circuit's conspiracy analysis (81A-82A) was the single comment by Armstrong's local sales manager (Roth) to Stern's president (Abrahamson), *i.e.*, that it "does not make a lot of sense" for Stern to distribute TINS' videos because Roth perceived them to "overlap" with Armstrong's videos. The district court,

after hearing all the evidence, correctly concluded that "the statement is not itself a threat, does not suggest a threat, and did not take place in a context suggesting a threat." 134A.[4]

The Third Circuit reached the opposite conclusion based on an attenuated chain of inferences in which Roth's statement was the crucial factor. 42A-43A; 81A-82A. But contrary to TINS' contention, the Third Circuit's conspiracy analysis does *not* identify any other alleged wrongdoing by Armstrong. The "other evidence" cited by TINS (but not in the Third Circuit's conspiracy analysis) consists of (i) a 1983 dispute between Armstrong and TINS, which was settled well before any events related to Stern;[5] (ii) an internal Armstrong memo (referring to "assistance"), of which Stern had no knowledge;[6] (iii) mischaracterizations of the testimony of

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[4] TINS argues that the jury was "[f]ree to disbelieve the testimony of Armstrong's district manager that he limited his comments to the 'overlap' and it 'doesn't make a lot of sense' remarks." Opp. 9, n.4. But *Bose Corp.* v. *Consumers Union*, 466 U.S. 485, 512 (1984), holds that disbelief of testimony inconsistent with a material fact in a plaintiff's claim cannot satisfy the plaintiff's burden of proof on that fact. Moreover, "antitrust law limits the range of permissible inferences," *Matsushita*, 475 U.S. at 588, and under *Monsanto*, a jury is not free to disregard testimony and then make up its own version of assumed facts to support a vertical conspiracy charge. 465 U.S. at 764 ("there must be evidence that tends to exclude the possibility" of independent action).

[5] Opp. 3-4, 7-8. The parties stipulated in the Final Pretrial Order (JA733-34) that this dispute involved (1) Armstrong's allegation that in 1983 TINS "had interfered . . . with contracts or valid prospective business relationships between Armstrong and certain Armstrong wholesalers," and (2) TINS' allegation that in 1983 Armstrong had "interfere[d] with contracts or valid prospective business relationships between certain Armstrong wholesalers and the TINS Corporation." This 1983 dispute was resolved by a Settlement Agreement in January 1984. The district court concluded that in relation to the 1984 events at Stern, the 1983 evidence was both "remote in time" and detached by "significant intervening events." 143A n.20. This ruling was undisturbed on appeal.

[6] Opp. 8. The full text of this memo is in the Appendix to the Petition. 191A-192A. The district court held (141A-142A), as is evident on the face of the memo, that the memo cannot support any inference of wrongful conduct. This is another ruling left undisturbed on appeal.

TINS' President (Fineman);[7] or (iv) impermissible inferences that an act or event occurred on the theory that the jury may have "disbelieved" a witness's contrary testimony.[8]

Finally, TINS claims that the Third Circuit's conspiracy ruling was correct on the theory that "this is not a vertical case" and therefore "the logic of *Monsanto's* holding . . . is simply irrelevant" because of the "distinct horizontal flavor" of the alleged anticompetitive effects in this case. Opp. 13. But that theory "introduces needless confusion" and was therefore expressly rejected in *Business Electronics* v. *Sharp Electronics*, 485 U.S. 717, 730 & n.4 (1988) (a "restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement," whereas

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TINS' assertion "that the reference to assistance meant that Armstrong would cut off critical promotions to distributors that signed up with TINS" (Opp. 8) was considered by the district court to be a "flagrant distortion of the evidence." 135A.

[7] TINS twice misstates Fineman's objectionable multi-level hearsay testimony regarding his telephone conversation with Abrahamson on June 23, 1984, the day after Stern canceled the Letter of Intent. Respondents attribute to Abrahamson the statement "that a principal reason for Stern's pulling out of TINS was leverage applied by Armstrong." Opp.4, 8. But in the cited hearsay testimony, Fineman said that Abrahamson told him that an unnamed Armstrong employee purportedly had said he would reject a request by an unnamed Stern employee who had allegedly said that Stern desired to use Armstrong's promotional funds "for TINS," *i.e.*, to promote the TINS magazine rather than an Armstrong product. JA 1907-09. In the court of appeals, TINS recognized in two of its briefs that such a statement by an unnamed Armstrong employee "hypothetically might have been legitimate." Appellants' Br. 32, Reply Br. 10. There is simply no reference in Fineman's testimony to any "principal reason" given by Abrahamson, or to any "leverage" by Armstrong.

[8] TINS characterizes as "suspicious" (Opp.9-10, n.4) the testimony of Roth and Abrahamson that they did not play golf on June 8, 1984, although Roth's desk calendar indicated that he had earlier reserved that date for such purpose. But whether or not they did play golf on June 8, "discredited testimony is not considered a sufficient basis for drawing a contrary conclusion," *Bose*, 466 U.S. at 512, and there is no evidence of anything said or done during any golf match.

"[r]estraints imposed . . . by agreement between firms at different levels of distribution [are treated] as vertical restraints" for purposes of "antitrust analysis").

2. **The Relevant Video Market Question.** TINS argues that the Petition is "wildly inaccurate" in saying that "the court of appeals applied a 'functional equivalency' test." Opp. 14. But that is precisely what the Third Circuit did, because the record included no facts to support a conclusion that the two different video products were in the same market based on the reasonable interchangeability test or the cross-elasticity of demand test under *United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377, 400, 404 (1956) ("*Cellophane*"). The cross-elasticity of demand test requires evidence showing that whenever there is a "slight" price increase for one of the two products in question, then "a considerable number of customers" capable of using both products will switch to the other product for which there is no price increase. *Id.* at 400. The Third Circuit did not even purport to apply this test because the record contains absolutely no evidence to satisfy the test.

Moreover, the words "reasonable interchangeability" do not appear at any point in the Third Circuit's market analysis. The fragments of evidence cited by TINS (Opp. 15) are conclusory and totally unresponsive to the legal test in *Cellophane* requiring "reasonable interchangeability for the purposes for which they are produced — price, use and qualities considered." *Id.* at 404.[9]

Nor can TINS support its argument that the Third Circuit made only an "offhand reference" (Opp. 15 n.7) when it cited

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[9] An illustrative example is the cited conclusory testimony of Fineman (Opp 15) that the two videos were in "the same market." But the evidentiary fact provided by Fineman was his "functionally equivalent" statement, which in effect TINS acknowledges to be insufficient for purposes of the legal requirement of reasonable interchangeability.

Fineman's "functionally equivalent" testimony. 55A. To the contrary, this was the *only* evidentiary fact cited by the Third Circuit that might satisfy a market definition test. Having the support of only Fineman's "functionally equivalent" testimony and facing a record with the testimony of TINS' National Sales Manager that substitution of Armstrong's videos for the TINS magazine "made no sense whatsoever," the most the Third Circuit was willing to say was that there could be an "inference" that retailers "may have perceived" the two videos to be "interchangeable." 56A. But the record contains no such retailer testimony, and speculation that functionally equivalent products "may be perceived" to be "interchangeable" cannot establish the "reasonable interchangeability" required by law.

It is crystal clear that the Third Circuit applied a "functionally equivalent" test and did not reach any conclusion that the two videos were "reasonably interchangeable."

3. **The Question on Injury to Competition and Related Antitrust Injury**. TINS argues that (1) "Armstrong did not *raise the issue [in this question] before the court of appeals*" (Opp. 16, emphasis in original), and (2) "[f]urthermore, the question presented has no merit." *Id.* To support the first proposition, TINS attached to its Brief the text of one part of Section VI of Armstrong's brief in the Third Circuit. But TINS failed to inform the Court that in another part of this same Section VI, Armstrong's brief argued:

> In any event, competition simply was not harmed. In a vertical case, the focus of legal inquiry is whether defendant's alleged practices improperly "foreclose competition in a substantial share of a line of commerce." *Pitchford* v. *Pepi*, 531 F.2d 92, 100 n.15 (3d Cir. 1976). TINS was allegedly "foreclosed" from access to only Stern, which served a tiny fraction of the alleged nationwide video magazine market, and TINS would

> continue to have available 2,198 other wholesalers reported by the Bureau of Census (A8563) or 449 other wholesalers based on Fineman's numbers. A1777. Even on Fineman's figures, lack of access to Stern denied TINS from only 1/4 of 1% of the available wholesalers and did *not* foreclose access to other wholesalers serving the Connecticut area or the nationwide market. This is clearly *de minimis* in its effect upon competition. *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 330-34 (1961) (foreclosure of less than 1% does not violate antitrust laws).

Armstrong's Brief in the Third Circuit at 47. Section VI of this brief also included a subsection entitled "Neither TINS Nor Fineman Incurred Antitrust Injury."[10]

On the merits, TINS' position is not advanced by its argument that Armstrong "erroneously equates the [injury to competition] standards of § 1 and § 2 of the Sherman Act." Opp. 18, n.10. To the contrary, Armstrong simply relies on the *underlying evidentiary facts* cited by the Third Circuit for its conclusion that Armstrong had no exclusionary power sufficient to injure competition for purposes of Section 2, as well as the undisputed facts on the availability to TINS of hundreds or even thousands of other distributors in the stipulated nationwide market. Those undisputed facts show as a matter of law that there was no injury to competition or related antitrust injury for purposes of Section 1.

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[10] TINS' assertion that Armstrong did not raise these arguments below is only one of many incorrect statements in TINS' Brief in Opposition. Most of the incorrect statements (despite their strident tone) are irrelevant or peripheral, and in any event no useful purpose would be served by responding in kind.

CONCLUSION

For the reasons stated here and in the Petition, the Court should grant the writ and either summarily reverse the Third Circuit's vertical conspiracy ruling or, alternatively, hear the case on the three questions presented in the Petition.

Respectfully submitted,

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